

*Pour encourager les autres?*  
**The Curious History and Distressing Implications  
of the Criminal Provisions of the Sarbanes-Oxley Act  
and the Sentencing Guidelines Amendments That  
Followed**

Frank O. Bowman, III\*

*In this article, Professor Bowman presents a legislative history of the Sarbanes-Oxley Act and the subsequent amendments to the U.S. Sentencing Guidelines. Professor Bowman explains the surprising interaction between the civil and criminal provisions of Sarbanes-Oxley. He also provides a dramatic and detailed account of the interplay of political interests and agendas that ultimately led to large sentence increases for serious corporate criminals and blanket sentence increases for virtually all federal fraud defendants. The tale illuminates the substance of the new legislation and sentencing rules, but is more broadly instructive regarding the distribution of power over criminal sentencing between the three branches and the hope for rationalizing sentencing policy through insulation from political pressure. Professor Bowman concludes that the Sentencing Commission may be fatally vulnerable to an emerging alliance between Congress and the Executive in sentencing matters, and that the Commission may no longer be capable of functioning as it was intended.*

*“Dans ce pays-ci il est bon de tuer de temps en temps un amiral pour encourager les autres.” — Voltaire<sup>1</sup>*

I. INTRODUCTION

In 1756, at the outbreak of the Seven Years' War, the French fleet invested the British island base of Minorca. Admiral John Byng was sent to break the blockade and relieve the garrison. Byng failed. For his trouble, he was court-martialed for

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\* M. Dale Palmer Professor of Law, Indiana University School of Law—Indianapolis. Formerly Special Counsel to the U.S. Sentencing Commission (1995–96) (on loan from U.S. Dept. of Justice); Assistant U.S. Attorney, S.D. Fla. (1989–96); Deputy District Attorney, Denver, Colorado (1983–87); Trial Attorney, U.S. Department of Justice (1979–82); and sometime defense attorney.

<sup>1</sup> VOLTAIRE, *CANDIDE*, ch. 23 (1759), available at <http://www.guipry.com/lire/voltaire/candide23.htm>.

neglect of duty<sup>2</sup> and, on March 14, 1757, ceremoniously shot on the deck of the H.M.S. Monarch.<sup>3</sup> Voltaire remarked wryly that, "[I]n this country [England] we find it pays to shoot an admiral from time to time to encourage the others."<sup>4</sup>

One hundred sixty years later, in 1917, sick of endless slaughter and incompetent leadership, nearly half the divisions of the French Army fighting on the Western Front mutinied.<sup>5</sup> Order was restored by Marshal Pétain through a combination of concessions to demands of the soldiers and harsh punishments for an unlucky few of the dissidents.<sup>6</sup> Determined to restore discipline, but conscious that they could not possibly execute the tens of thousands of men whose refusal to fight technically constituted mutiny,<sup>7</sup> the French high command convened summary courts martial, selected supposed ringleaders,<sup>8</sup> sometimes by lot,<sup>9</sup> condemned 554 soldiers to death, and ultimately shot forty-nine.<sup>10</sup> The French, both during the Great War and since, characterized their executions of deserters as punishment imposed "as an example."<sup>11</sup> Non-Gallic observers, perhaps less

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<sup>2</sup> See PETER BURKE, *CELEBRATED NAVAL AND MILITARY TRIALS* 72–81 (1866), available at <http://www.hilldale.edu/dept/History/War/Navy3/Byng/1756-Trial.htm>.

<sup>3</sup> See WILLIAM LAIRD CLOWES, *THE ROYAL NAVY: A HISTORY FROM THE EARLIEST TIMES TO THE PRESENT* (1997), available at <http://home.planet.nl/~pdavis/Byng.htm>; see also ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660–1783*, 290–91 (1918).

<sup>4</sup> VOLTAIRE, *CANDIDE* 111 (John Butt trans., Penguin 1947) (1759).

<sup>5</sup> See IAN F. BECKETT, *THE GREAT WAR* 223 (2001); JERE CLEMENS KING, *THE FIRST WORLD WAR* 258 (1972); LEONARD V. SMITH ET AL., *FRANCE AND THE GREAT WAR: 1914–1918*, 122 (2003). A debate has endured for decades over whether the widespread "acts of collective indiscipline" among units of the French Army should be characterized as mutiny, but the preponderance of opinion among historians is that the term is apt.

<sup>6</sup> See CORELLI BARNETT, *THE SWORDBEARERS* 216–36 (1963) (describing in detail Pétain's response to the mutinies).

<sup>7</sup> Estimates of the number of French soldiers actively involved in the mutiny vary, but many authorities suggest figures between 25,000 and 40,000. See SMITH ET AL., *supra* note 5, at 122 ("The total number of 'mutineers' is most reliably estimated at 25,000–30,000."); GUY PEDRONCINI, *LES MUTINERIES DE 1917* 194, 215 (1967) (30,000 to 40,000); BECKETT, *supra* note 5, at 223 ("30,000 to 40,000 men were involved with incidents in 68 of the army's 112 divisions.").

<sup>8</sup> See SMITH ET AL., *supra* note 5, at 130.

<sup>9</sup> See MARC FERRO, *THE GREAT WAR: 1914–1918*, 183 (1973). It was rumored during the war and for many years thereafter that the French had simply lined up the offending units, picked out every tenth man, and had him shot—a practice underlying the term "decimation." See BECKETT, *supra* note 5, at 224. However, there seems to be no truth to these reports, which probably had their genesis in the drawing of lots in some mutinous units for selection of men to be subject to court martial.

<sup>10</sup> See FERRO, *supra* note 9, at 184; JOHN KEEGAN, *THE FIRST WORLD WAR* 331 (1998).

<sup>11</sup> Compare Marshal Pétain's characterization of his own 1914 order to have a deserter shot "as an example," FERRO, *supra* note 9, at 184, with French Prime Minister Lionel Jospin's 1998 plea that the mutineers of 1917 "'executed for example,' in the name of a kind of military discipline whose harshness was equaled only by the battle itself, be reintegrated . . . in our national memory." SMITH ET AL., *supra* note 5, at 186.

sensitive to turning Voltaire's pointed irony on the French themselves, often speak of these selective executions as punishment "*pour encourager les autres*."<sup>12</sup>

The story of the criminal provisions of the Sarbanes-Oxley Act of 2002<sup>13</sup> and the ensuing amendments to the Federal Sentencing Guidelines put me in mind of both these incidents of military history. The parallel first struck me because the Sarbanes-Oxley saga began with a frenzied determination by some legislators to shoot a few of the erring admirals of American business in response to the eruption of corporate scandals in 2002, and culminated in a 2003 round of sentencing guideline amendments that extended the original punitive impulse to virtually everyone convicted in federal court of some form of stealing—the faceless foot soldiers of economic crime.

The historical metaphor seemed even more apt when I recalled the particulars of Admiral Byng's case. Byng may, from a strictly professional point of view, have had some culpability for the failure to relieve Minorca.<sup>14</sup> But his conviction and the extraordinary harshness of his sentence were widely viewed as unjust because his case was so transparently intended to divert public attention from the military and political misjudgments of his naval superiors and the government of the day. One view of the criminal provisions of the Sarbanes-Oxley Act is that they resulted from a political process which sought to blame the wave of corporate scandal on a few miscreant corporate chieftains and to dissipate the momentum for reform of failing structures of corporate governance and the incestuous relationships between corporate management and those, such as boards of directors and outside auditors, whose job it is to protect employees, shareholders, corporate treasuries, and the integrity of markets. The condemnation of Admiral Byng was designed to shift away from the government the onus of Britain's unpreparedness for the outbreak of war and the Admiralty's failure to provide Byng with the forces to accomplish his mission. Characterizing corporate scandal as crime shifts the focus away from degenerate norms of legal business behavior and deflects criticism of those (both in and out of government) complicit in allowing those norms to emerge and opposed to taking stern measures to change them.

But in drawing these more explicit parallels between European military history and a contemporary American legal controversy, I am running ahead of my story. This article will tell the tale of the criminal provisions of the Sarbanes-

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<sup>12</sup> Fred L. Borch, *Shot at Dawn*, 131 MIL. L. REV. 340, 340 (1991) ("[By 1916,] British army commanders believed that military discipline would crumble without a death penalty. The commanders were relying on the deterrent effect of the death penalty; '*pour encourager les autres*' (to encourage others) was the phrase of the day."); see also Robert Barr Smith, *What Price Propaganda? When the Paths of Glory Led But to the Pulpit*, 22 OKLA. CITY U. L. REV. 89, 89 (1997) (placing the phrase in the mouth of a character in the play and movie "Paths of Glory" that was probably based in part on the French Army mutinies of 1917).

<sup>13</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 765 (2002) [hereinafter Sarbanes-Oxley].

<sup>14</sup> For dispassionate and authoritative analyses, see CLOWES, *supra* note 3 and MAHAN, *supra* note 3, at 286–87.

Oxley Act of 2002 and of the changes in the Federal Sentencing Guidelines enacted in response to the Act.

Section II explains the structure of the federal criminal law of economic crimes, with particular emphasis on federal sentencing law. Section III contains a legislative history of the Sarbanes-Oxley Act. The available evidence suggests: (1) The criminal provisions of the Act assumed their final shape as a byproduct of the debate over the civil regulatory provisions of the bill. From the outset, Democrats eager to be seen as tough on corporate malefactors proposed tough civil regulatory measures and new criminal legislation. In due course, Republicans in Congress and the Bush Administration who wanted only modest reform of corporate governance and accounting rules sought to cast the debate as primarily one about crime in order to reduce the momentum for more aggressive civil regulatory action. The upshot was a bidding war between the parties resulting in harsher criminal measures than either side had originally proposed. (2) The criminal provisions of the Act were drafted with extraordinary haste, a haste that produced inartful and sometimes vague or duplicative provisions. (3) In its frenzy to legislate in 2002, Congress seems to have paid little attention to the fact that the Sentencing Commission had just revised economic crime sentencing rules and increased most economic crime sentences in 2001. The result was adoption of statutory language which intruded to a substantial degree on the independence of the United States Sentencing Commission.

Section IV of the Article discusses the effect of the Sarbanes-Oxley Act on the federal sentencing guidelines for economic crimes. From August 2002 through May 2003, the Sentencing Commission worked to craft guideline amendments responsive to the directives in the Act. Although the language of the Act would have been satisfied by guideline amendments narrowly targeting serious corporate fraud, the Justice Department and some members of Congress placed immense pressure on the Commission to increase sentences for everyone convicted of any federal economic crime. The Article analyzes the arguments for and against a general sentence increase. Reluctantly, and against its own better judgment, the Commission yielded and passed both targeted sentence increases for big corporate criminals and a measure raising sentences on all but the very least serious economic crimes.

Section V considers the broader implications of the Sarbanes-Oxley Act and the subsequent fight over post-Sarbanes-Oxley guidelines amendments. It concludes that the Sarbanes-Oxley story, when considered together with other recent congressional actions, raises doubts about the continued viability of the Sentencing Commission as an independent source of policy judgment in sentencing matters. In particular, it suggests that Congress and the Department of Justice are increasingly acting in concert to constrict judicial sentencing authority in individual cases and the Sentencing Commission's authority over sentencing policy nationally. The result of aligning Congress's plenary authority over criminal sentencing with the Justice Department's predictably stern views on punishment has been to marginalize the role of the judicial branch in sentencing

and to move the guidelines process another step in the direction of being merely a one-way upward ratchet for sentence lengths.

## II. FEDERAL ECONOMIC CRIME SENTENCING

Understanding the debate over the criminal parts of the Sarbanes-Oxley Act requires a reasonable grasp of federal substantive criminal law and of the structure and history of the Federal Sentencing Guidelines provisions governing economic crimes. Part A of this section explains the basic structure of the Guidelines. Part B describes the state of the federal substantive law of economic offenses. Part C explains the Guidelines' approach to economic offenses. Part D describes the five-year deliberative process that produced the sweeping 2001 amendments to the economic crime guidelines known as the "Economic Crime Package."

### A. Understanding the Federal Sentencing Guidelines

#### 1. Federal Sentencing Before the Guidelines

For most of the Twentieth Century prior to the Sentencing Reform Act of 1984 (the "SRA"),<sup>15</sup> the rehabilitative<sup>16</sup> or "medical" model<sup>17</sup> of sentencing prevailed in the federal (and state) courts.<sup>18</sup> Sentencing rested on the assumption that, within certain limits, criminal deviance could be treated like any other disorder.<sup>19</sup> Therefore, sentences were supposed to be "individualized," in the way

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<sup>15</sup> Comprehensive Crime Control Act of 1984, tit. II, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

<sup>16</sup> See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981) (discussing the rise and fall of the "rehabilitative ideal").

<sup>17</sup> See PAMALA L. GRISET, *DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE* 11 (1991) (discussing the "rise of the rehabilitative juggernaut" between 1877-1970, and noting that "[a] medical analogue was frequently invoked").

<sup>18</sup> Professor Allen noted that "rehabilitation . . . seen as the *exclusive* justification of penal sanctions . . . was very nearly the stance of some exuberant American theorists in mid-twentieth century." ALLEN, *supra* note 16, at 3; see also AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE* 83 (1971) ("Despite [its] shortcomings the treatment approach receives nearly unanimous support from those working in the field of criminal justice, even the most progressive and humanitarian.").

<sup>19</sup> The system recognized, albeit grudgingly, that some defendants were, in effect, "incurable" and thus could only be quarantined through lengthy sentences, and that in a few cases the crime was so egregious that the public demand for retribution outweighed rehabilitative considerations. For example, both the death penalty and life imprisonment were imposed throughout the period when the rehabilitative ideal dominated American sentencing, with no pretense that the purpose of either type of sentence was rehabilitation of the offender. See Hugo Adam Bedau, *The Death Penalty in America: Yesterday and Today*, 95 DICK. L. REV. 759, 762-64 (1991) (describing widespread use of the death penalty in America throughout the twentieth century for crimes including murder, armed robbery, rape, and kidnapping); see also Dane Archer, Rosemary Gartner & Marc Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983) (attributing use of death penalty in part to disbelief in rehabilitation).

that medical treatment is individualized, according to the symptoms and pathology of the offender.<sup>20</sup>

In the 1970s and 1980s, the rehabilitative, indeterminate model of sentencing fell into disfavor in both federal<sup>21</sup> and state courts for a variety of reasons, including rising crime,<sup>22</sup> mounting evidence that prisoners were not being rehabilitated,<sup>23</sup> and increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.<sup>24</sup> The collapse of the rehabilitative model and a fortuitous alignment of political forces from the congressional right and left produced the Sentencing Reform Act of 1984, and three years later, the Federal Sentencing Guidelines.<sup>25</sup>

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<sup>20</sup> See *Williams v. New York*, 337 U.S. 241, 248 (1949) (referring to “[t]oday’s philosophy of individualizing sentences”); *Burns v. United States*, 287 U.S. 216, 220 (1932) (“It is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.”).

<sup>21</sup> For further discussion of the character of pre-Guidelines federal sentencing, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–89 [hereinafter Bowman, *Quality of Mercy*] and Frank O. Bowman, III, *Fear of Law: Thoughts on ‘Fear of Judging’ and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 310–16 (2000).

<sup>22</sup> See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992) (noting that during the 1970s “the perception that crime rates were out of control led some officials to demand surer and stiffer sanctions against criminals as a means of preventing crime”).

<sup>23</sup> See Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 685–86 (1980) (“In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offenders effectively through incarceration.”); Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 11 (1983) (“[N]o serious researcher has been able to claim that rehabilitation routinely could be made to work for the bulk of the offenders coming before the courts.”); see also Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (urging that rehabilitation be revisited as a dominant rationale for criminal sanctions).

<sup>24</sup> One of the first and most influential critics of pre-Guidelines sentencing on the ground of unjustifiable sentence disparity was Judge Marvin E. Frankel, who said of the indeterminate sentencing system in the federal courts that, “the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) [hereinafter FRANKEL, *CRIMINAL SENTENCES*]; see also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 23 (1967) (finding sentencing disparity to be pervasive); NAT’L ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS* 142 (1973) (same); Peter B. Hoffman & Barbara Stone-Meierhoefer, *Application of Guidelines to Sentencing*, 3 LAW & PSYCHOL. REV. 53, 53–56 (1977) (describing criticisms of then-extant sentencing practices on the ground of “unwarranted sentencing disparity”).

<sup>25</sup> For discussion of the federal reform movement that, in general, rejected the rehabilitative model of sentencing and produced the Guidelines, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises*

The Guidelines were written, and continue to be studied and amended, by the U.S. Sentencing Commission. The Sentencing Commission is an “independent commission in the judicial branch of the United States,” whose members are nominated by the President and confirmed by the Senate.<sup>26</sup> It consists of seven voting members, no more than four of whom may be members of the same political party.<sup>27</sup> Until 2003, the law required that at least three commissioners be federal judges.<sup>28</sup> In 2003, the so-called PROTECT Act restricted the number of judges on the Commission to no more than three.<sup>29</sup> The Attorney General or his designee has since the inception of the Commission been a non-voting *ex officio* member of the Commission.<sup>30</sup>

Congress created the Sentencing Commission for three basic reasons. First, the substantive federal criminal law is a ghastly mess, with hundreds of overlapping and often oddly drafted provisions and no system for classifying the relative seriousness of offenses. Congress tried and repeatedly failed throughout the 1970s to bring order to this chaos by writing a rationalized federal criminal code.<sup>31</sup> Fresh from this frustration, the legislators recognized that a body of experts was needed to draft reasonable sentencing rules.<sup>32</sup> Second, Congress realized that the first set of rules would certainly be imperfect and would require monitoring, study, and modification over time. For this task also a body of experts was required.<sup>33</sup> Third, Congress concluded that making sentencing rules required not only expertise, but some insulation from the distorting pressures of politics.<sup>34</sup>

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*Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Bowman, *Quality of Mercy*, *supra* note 21, at 680–92.

<sup>26</sup> 28 U.S.C. § 991(a) (2000).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 650 (2003) [hereinafter PROTECT Act] (amending 28 U.S.C. § 991(a) (2000)).

<sup>30</sup> 28 U.S.C. § 991(a) (2000).

<sup>31</sup> See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 92–135 (1998) (reviewing historical efforts to revise the federal criminal code).

<sup>32</sup> See *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (“Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”); see also ANDREW VON HIRSCH, *THE SENTENCING COMMISSION AND ITS GUIDELINES* 62, 67 (1987) (suggesting that the Commission, not Congress, should identify dominant sentencing purposes because the Commission is “a body that has the leisure and understanding to weigh such issues”).

<sup>33</sup> See 28 U.S.C. § 994(o) (2000); see also Breyer, *supra* note 25, at 7–8 (“[T]he Commission remained aware throughout the drafting process that Congress intended it to be a permanent body that would continuously revise the Guidelines over the years.”).

<sup>34</sup> See Dale G. Parent, *What Did the United States Sentencing Commission Miss?* 101 YALE L.J. 1773, 1775 (1992) (noting that the Minnesota Sentencing Commission, in contrast to the U.S.

Thus, the Sentencing Commission was situated outside both of the political branches of government, and made independent even of the normal chain of command in the judicial branch in which it formally resides.<sup>35</sup> The Commission's anomalous independent status was one of the primary grounds for challenges to the Guidelines' legality, but the Supreme Court found the Commission and the Guidelines constitutional.<sup>36</sup>

## 2. The Structure of the Federal Sentencing Guidelines

The Federal Sentencing Guidelines are, in a sense, no more than a long set of instructions for one chart—the Sentencing Table.<sup>37</sup> The goal of Guidelines calculations is to arrive at numbers for the vertical (offense level) and horizontal (criminal history category) axes on the Sentencing Table grid, which in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months. For example, a defendant whose offense level is twenty-six, and whose criminal history category is I, is subject to a sentencing range of sixty-three to seventy-eight months.<sup>38</sup>

The criminal history calculation reflected on the horizontal axis of the Sentencing Table is a rough effort to determine the defendant's disposition to criminality, as reflected in the number and nature of his prior contacts with the criminal law. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies.<sup>39</sup>

The offense level reflected on the vertical axis of the Sentencing Table is a measurement of the seriousness of the present crime. The offense level calculation begins with the crime of which the defendant was actually convicted. The court must determine, primarily by reference to the "Statutory Index,"<sup>40</sup> which guideline in Chapter Two ("Offense Conduct") applies to that crime. Most Chapter Two offense conduct guidelines contain two components: a "base offense level"—a seriousness ranking based purely on the fact of conviction of a particular statutory

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Sentencing Commission, realized that "the creation of a guidelines commission merely shifted the politics of sentencing from the legislature to a commission").

<sup>35</sup> See *Mistretta*, 488 U.S. at 393 (noting that the Sentencing Commission "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch"). In dissent in *Mistretta*, Justice Scalia argued that the Commission's lawmaking power combined with the lack of control over it by any official of the judicial branch rendered the Commission an unconstitutional body. *Id.* at 422–27.

<sup>36</sup> *Id.* at 412.

<sup>37</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2003).

<sup>38</sup> *Id.* By statute, the top end of the range can be no more than 25% higher than the bottom end. See 28 U.S.C. § 994(b)(2) (2000); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2003). For discussion of the "25% rule," see Bowman, *Quality of Mercy*, *supra* note 21, at 691 n.49, 712–13.

<sup>39</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 4 (2003) for the rules regarding calculation of criminal history category.

<sup>40</sup> U.S. SENTENCING GUIDELINES MANUAL app. A (2003).



violation—and a set of “specific offense characteristics.” The “specific offense characteristics” are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They “customize” the crime. For example, the guidelines differentiate between a theft of \$1000 and a theft of \$1,000,000,<sup>41</sup> or between a bank robbery where the robber hands the teller a note, and a robbery where the robber pistol-whips the teller and shoots the bank guard.<sup>42</sup>

Once the court determines an offense level by applying the Offense Conduct rules from Chapter Two, it considers a series of other possible adjustments contained in Chapter Three. These include increases in the offense level based on factors such as the defendant’s role in the offense;<sup>43</sup> if the defendant engaged in obstruction of justice;<sup>44</sup> commission of an offense against a government official<sup>45</sup> or particularly vulnerable victim;<sup>46</sup> and the existence of multiple counts of conviction.<sup>47</sup> The court may also reduce the offense level based on a defendant’s “mitigating role” in the offense<sup>48</sup> or on his so-called “acceptance of responsibility.”<sup>49</sup>

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<sup>41</sup> This was true under the former separate guidelines for theft and fraud. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2000) (reflecting an increase in two offense levels for a theft of \$1000 and increase of thirteen offense levels for a theft of \$1,000,000). It remains the case under the consolidated economic crime guidelines adopted in 2001. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2001) (reflecting no increase in offense level for a theft or fraud loss of \$1000 and an increase of fourteen offense levels for a loss of \$1,000,000).

<sup>42</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b) (2003) (reflecting possible increases of up to eleven offense levels for the use of a weapon and causing injuries in the course of a robbery).

<sup>43</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2003). The defendant’s offense level can be enhanced by either two, three, or four levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise.

<sup>44</sup> U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2003). Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.3 (2002).

<sup>45</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.2 (2003).

<sup>46</sup> *Id.* (creating an enhancement where a victim was selected based on “race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation” and in the case of a victim “unusually vulnerable due to age, physical or mental condition”).

<sup>47</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 3, pt. D (2003).

<sup>48</sup> U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2003) (allowing decreases in offense level of two or four levels if defendant is found to be a “minor participant” or “minimal participant” in the criminal activity).

<sup>49</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003) (allowing reduction of two offense levels where defendant “clearly demonstrates acceptance of responsibility,” and three offense levels if otherwise applicable offense level is at least sixteen and defendant has “assisted authorities in the investigation or prosecution of his own misconduct” by taking certain steps). Despite the euphemism “acceptance of responsibility,” § 3E1.1 is nothing more nor less than an institutionalized incentive for guilty pleas.

Once the court has determined the offense level on the vertical axis and the criminal history category on the horizontal axis, it can determine the sentencing range. The judge retains largely unfettered discretion to sentence *within that range*.<sup>50</sup> However, in order to go above or below the range, to “depart,” the judge must explain why, and the explanation must be couched in terms of factors for which the Guidelines do not adequately account already.<sup>51</sup>

Finally, the Sentencing Commission created “relevant conduct.”<sup>52</sup> A thorough discussion of relevant conduct is beyond the scope of this article, but the essence of the concept is that the court must sentence each defendant based on *all of what he really did* as part of the same transaction or series of related transactions that resulted in the count of conviction, regardless of the specific offense of which a defendant is convicted after trial or as a result of a plea.

### B. The Substantive Federal Law Governing Economic Crimes

There are literally hundreds of federal economic crimes. Of the roughly 1000 criminal statutes listed in the Statutory Index to the 2002 Federal Sentencing Guidelines,<sup>53</sup> some 250 of them are sentenced under § 2B1.1, the consolidated theft, fraud, and destruction of property guideline.<sup>54</sup> This total does not include the federal versions of crimes such as burglary,<sup>55</sup> robbery,<sup>56</sup> extortion,<sup>57</sup> blackmail,<sup>58</sup> bribery,<sup>59</sup> or criminal copyright infringement,<sup>60</sup> all of which are also crimes of dishonest acquisition.

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<sup>50</sup> U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(a) (2003) (“A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.”).

<sup>51</sup> 18 U.S.C. § 3553(b) (2000); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2003).

<sup>52</sup> The term “relevant conduct” and its applications to guideline calculations are defined in U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2002). For a general discussion of relevant conduct and its function in the Guidelines system, see William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990); see also Bowman, *Quality of Mercy*, *supra* note 21, at 702–03.

<sup>53</sup> The Statutory Index to the Guidelines, U.S. SENTENCING GUIDELINES MANUAL app. A (2003), is a list of almost all the federal statutory provisions prescribing criminal penalties. It contains a separate entry for each separately chargeable statutory subsection. The list “specifies the guideline section or sections ordinarily applicable to the statute of conviction.”

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 2B2.1.

<sup>56</sup> *Id.* § 2B3.1.

<sup>57</sup> *Id.* § 2B3.2.

<sup>58</sup> *Id.* § 2B3.3.

<sup>59</sup> *Id.* § 2B4.1.

<sup>60</sup> *Id.* § 2B5.3.

Statutory penalties for federal economic crimes vary widely, from misdemeanor levels of a year or less<sup>61</sup> to life imprisonment for conducting a "continuing financial crimes enterprise."<sup>62</sup> These penalties are not tied to an overall ranking scheme, such as those nearly universal in state systems, where the legislature creates a limited set of offense categories ("Class 1" or "Class 2" or "Class 3" felonies, and so on) and then assigns every crime in the criminal code to one of the categories.<sup>63</sup> Such a scheme incorporates legislative judgments about the relative seriousness of different offenses and covers all types of crime. By contrast, the penalty ranges for federal economic offenses seem almost whimsical, owing more to the political enthusiasms of the moment they were enacted than any reasoned effort to compare the relative seriousness of different crimes.

For example, in 2002, prior to Sarbanes-Oxley, the statutory maximum sentence for one count of wire or mail fraud was five years,<sup>64</sup> but the per count maximum could be thirty years if the same offense were committed against a federally insured financial institution, and the prosecutor elected to charge bank fraud rather than mail fraud.<sup>65</sup> This huge disparity between the statutory maximum sentences of two statutes that can cover the same conduct was created between 1988 and 1990 when Congress, gripped by the savings and loan debacle of the late 1980s, raised the maximum penalty for bank fraud from five years to twenty years in 1989, and then from twenty years to thirty years in 1990.<sup>66</sup> As we will see, this spasmodic congressional reaction to the crime *du jour* was replicated in the Sarbanes-Oxley Act.

The general confusion created by the absence of meaningful congressional classifications of relative offense seriousness is magnified in federal economic crime prosecutions by the multitude of counts commonly charged, or at least chargeable, in such cases. For many crimes, particularly crimes against persons prosecuted in state courts, the statutory maximum sentence for the main offense of

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<sup>61</sup> See 18 U.S.C. § 656 (2000) (providing that the penalty for embezzlement of less than \$1000 by a bank employee or officer shall be a fine, imprisonment for not more than one year, or both).

<sup>62</sup> See 18 U.S.C. § 225(a) (2000) (prohibiting organizing, managing, or supervising a continuing financial crimes enterprise).

<sup>63</sup> See, e.g., COLO. REV. STAT. § 18-1.3-401 (2003) (classifying felonies into six classes); *id.* § 18-1.3-501 (2003) (classifying misdemeanors into three classes); WASH. REV. CODE § 9A.20.010 (2000) (classifying felonies into three classes and misdemeanors into two classes).

<sup>64</sup> See 18 U.S.C. §§ 1341, 1343 (2000).

<sup>65</sup> See 18 U.S.C. § 1344 (2000) (providing that penalty for bank fraud shall be a \$1 million fine, thirty years' imprisonment, or both).

<sup>66</sup> Compare 18 U.S.C. § 1344 (1988) (setting maximum sentence for bank fraud at five years imprisonment and a \$10,000 fine), with Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989) (increasing maximum fine for violation of § 1344 from \$10,000 to \$1 million, and maximum term of imprisonment from five years to twenty years), and with Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (increasing maximum term of imprisonment for violation of § 1344 from twenty years to thirty years).

conviction restricts the length of the sentence that can actually be imposed.<sup>67</sup> But in federal white-collar cases, the statutory maximum sentence for a single count of conviction usually has no relation to the maximum sentence a judge could actually impose because a single criminal scheme so often consists of a multitude of acts separately chargeable as federal crimes. For example, the wire and mail fraud statutes, the workhorses of federal white-collar prosecution, make every separate mailing or interstate wire communication in furtherance of the criminal scheme a separately indictable and punishable offense.<sup>68</sup> Thus, before the advent of the Federal Sentencing Guidelines, the possible sentence faced by a federal economic crime offender ran from a minimum of probation to a maximum term of imprisonment calculated by adding up the statutory maximum sentences for all counts of conviction.<sup>69</sup> Therefore, the true limit on a fraud defendant's sentence had virtually nothing to do with the ostensible five-year statutory maximum, but was determined by the discretionary prosecutorial choice of how many counts to charge.

After the Guidelines were enacted, statutory maximum sentences became, if anything, even less meaningful. The theoretical upper limit on a defendant's sentence remains the sum of the statutory maxima for all counts of conviction.<sup>70</sup> The current *de facto* upper limit on a defendant's sentence is the top of the defendant's guideline range, so long as the sum of the statutory maxima of all the counts of conviction exceeds the top of the range—a condition the prosecution can virtually always ensure.<sup>71</sup>

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<sup>67</sup> For discussion of this point, see Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 482 (1998).

<sup>68</sup> See 18 U.S.C. § 1341 (2000) (mail fraud); 18 U.S.C. § 1343 (2000) (wire fraud); *Badders v. United States*, 240 U.S. 391, 394 (1916) (holding each mailing in furtherance of a scheme to defraud constitutes a separate count of the indictment); *United States v. Stull*, 743 F.2d 439, 444–45 (6th Cir. 1984) (same); *United States v. Clevenger*, 458 F. Supp. 354, 359 (E.D. Tenn. 1978) (holding separate counts for separate mailings in furtherance of same scheme to defraud is not multiplicitious); *United States v. Brodbeck*, 430 F. Supp. 1056, 1060 (E.D. Wis. 1977) (same); 18 U.S.C. § 1343 (2000); *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975) (each separate use of wire communication in aid of same scheme to defraud is separate offense).

<sup>69</sup> See, e.g., *United States v. Perez*, 956 F.2d 1098, 1102–03 (11th Cir. 1992) (affirming the power of a district court to impose consecutive sentences for convictions of burglary and theft arising from the same transaction).

<sup>70</sup> See *United States v. McLeod*, 251 F.3d 78, 83–84 (2d Cir. 2001) (holding that the maximum possible sentence under the Guidelines in a multiple-count conviction is the sum of the statutory maximum sentences for all counts of the conviction, and where the Guidelines dictate a sentence higher than the statutory maximum of any one count, the sentencing court is to impose consecutive sentences in order to effectuate the Guidelines); *United States v. Saccoccia*, 58 F.3d 754, 786–87 (1st Cir. 1995) (same); see also *United States v. Flowers*, 995 F.2d 315, 316–17 (1st Cir. 1993) (holding that § 3584(a) authorizes the Sentencing Commission “to write guidelines that say when, and to what extent, [incarcerative] terms should be concurrent or consecutive”).

<sup>71</sup> A sentence higher than the top of the guideline range is legally possible if the judge elects to depart upwards. However, in 2001, judges ordered upward departures for only 0.6% of all federal

### C. *The Original Federal Sentencing Guidelines for Economic Crimes*

The original Sentencing Commission's approach to drafting guidelines for particular crimes was empirical and historical, rather than normative and philosophical. That is, with a few notable exceptions, the Commissioners did not attempt to determine what the penalty for any given offense *should be*; rather, they set out to reproduce the sentencing patterns in existence before the Guidelines.<sup>72</sup> The objective was to identify the characteristics of both offenders and offenses that judges had historically deemed important in making sentencing choices. In effect, the Commission attempted to discover the federal common law of sentencing and codify it.

In the case of economic crimes, the original Commission adhered to its historical approach in some respects, but diverged from it in others.<sup>73</sup> On the one hand, the Commission attempted to identify factors that had historically been important in sentencing economic crimes, and to incorporate those factors in the offense conduct guidelines for such crimes. On the other hand, the Commission consciously chose to increase sentences for crimes against property over pre-Guidelines levels.<sup>74</sup> The commissioners were plainly concerned that probationary sentences had been too common in economic crimes,<sup>75</sup> and decided that the Guidelines' objectives would be better served by the imposition of "short but certain terms of confinement for many white-collar offenders . . . ."<sup>76</sup>

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defendants sentenced to a term of incarceration. See U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl. 27 (2002).

<sup>72</sup> The Commission studied a sample of 10,000 actual past cases to determine what sentences had been given and why. See Breyer, *supra* note 25, at 1, 7 n.50.

<sup>73</sup> The most prominent exception to the general approach of attempting to reproduce pre-Guidelines sentence levels was narcotics sentences, where, largely in response to statutory mandates, the Commission created a structure which dramatically increased drug sentences. See generally Bowman, *Quality of Mercy*, *supra* note 21, at 733–34, 740–47 (discussing drug sentences under the Guidelines and arguing that they are, in general, too long); see also Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 479 (2002) (analyzing the decline in the average federal narcotics sentence between 1992 and 2000).

<sup>74</sup> See Breyer, *supra* note 25, at 20–21; see also Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2047 (1992) ("[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences], taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.").

<sup>75</sup> As Justice Breyer, then a member of the Sentencing Commission, put it in 1988, "A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences." Breyer, *supra* note 25, at 7 n.49; see also John Hagan & Ilene Nagel Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC'Y REV. 467, 475 (1979) (quoting an Assistant United States Attorney regarding office policy of vigorous advocacy in white-collar sentencing hearings "because unless we did [advocate strongly for imprisonment] almost everybody would walk out on probation").

<sup>76</sup> Breyer, *supra* note 25, at 20.

The original Sentencing Commission divided federal economic crimes into two basic types: (1) crimes involving “the most basic forms of property offenses: theft, embezzlement . . . transactions in stolen goods, and simple property damage or destruction,”<sup>77</sup> sentenced under § 2B1.1,<sup>78</sup> and (2) fraud crimes, sentenced under § 2F1.1. Curiously, having gone to the trouble of writing a theft-fraud distinction into federal sentencing law, the Commission drafted two virtually identical guidelines, both based primarily on two factors found significant in pre-Guidelines practice—the amount of “loss” resulting from the defendant’s criminal conduct and the amount and sophistication of planning activity involved in the crime.<sup>79</sup> In both theft and fraud cases, the offense level was determined by starting with a “base offense level,” adding a number of offense levels derived from the “Loss Table” (a chart assigning increasing numbers of offense levels for increasing amounts of loss), and adding or subtracting offense levels based on “specific offense characteristics” such as a defendant’s role in the offense or harm suffered by vulnerable victims.

The heavy reliance on “loss” amount to set sentence length was controversial in some quarters, but the details of that debate need not detain us here.<sup>80</sup> The critical point is that the amount of “loss” matters greatly in every federal economic crime sentencing. Because the Loss Table assigns offense levels based on loss amount, economic crime sentences can be raised or lowered either by changing the dollar amounts on the Loss Table, or by changing the definition of “loss” to broaden or narrow the categories of economic harm that count as loss for sentencing purposes.

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<sup>77</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. B(1), introductory cmt. (2001).

<sup>78</sup> Property damage cases were nominally sentenced under § 2B1.3, but the core of that guideline is a cross-reference to § 2B1.1 incorporating the loss table of § 2B1.1(b)(1).

<sup>79</sup> In the commentary to the former fraud guideline, the Commission observed: “Empirical analyses of pre-guidelines practice showed that the *most important factors* that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, *these are the primary factors upon which the guideline has been based.*” U.S. SENTENCING GUIDELINES MANUAL § 2F1.1, cmt. background (2000) (emphasis added).

The commentary to the former theft guideline states: “The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. . . . The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. background (2000).

<sup>80</sup> See Bowman, *supra* note 67, at 497–502; Frank O. Bowman, III, *The 2001 Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 25–29, 38–47 (2001) [hereinafter Bowman, *2001 Sentencing Reforms*].

#### D. Evolution and Reform of the Economic Crime Guidelines

##### 1. 1987–1995: An Unplanned Upward Drift

Between 1987 and 1995, the guidelines governing economic crime changed markedly. Beginning in 1988, the Sentencing Commission tweaked the theft and fraud guidelines nearly annually. In 1989, the Commission amended the loss table to increase sentences for defendants causing loss greater than \$40,000.<sup>81</sup> In ensuing years, it added an array of specific offense characteristics and passed numerous amendments in an attempt to clarify the reach of the troublesome term “loss.” The lush thicket of amendments had two basic effects. First, the table modification, as well as virtually all of the new specific offense characteristics and definitional alterations to the loss concept, tended to increase guideline sentence levels for economic offenders. Second, the proliferating amendments made these guidelines increasingly complex and ever more difficult to apply.

##### 2. 1996–2001: The Economic Crime Package

By the mid-1990s, the Commission perceived a need for a comprehensive rethinking of economic crime sentencing. The case for reform had three main components. First, the artificial division of economic crimes into “thefts” and “frauds” for sentencing purposes was both logically suspect and a source of confusion in practice.<sup>82</sup> Second, the tangle of provisions attempting to define “loss” was a swamp in desperate need of draining.<sup>83</sup> Third, many participants in the national sentencing policy debate had concerns about sentence severity. The Justice Department,<sup>84</sup> the Judicial Conference of the United States,<sup>85</sup> and many

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<sup>81</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amends. 99 & 154 (1989).

<sup>82</sup> For detailed discussions of the theft-fraud distinction, see Bowman, *supra* note 67, at 490-97; Frank O. Bowman, III, *A Judicious Solution: The Criminal Law Committee Draft Redefinition of the “Loss” Concept in Economic Crime Sentencing*, 9 GEO. MASON L. REV. 451, 456-57 (2000); and Bowman, *2001 Sentencing Reforms*, *supra* note 80, at 23-25. For a dissenting view, see Jeffrey Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001 (2001). For a rejoinder to Parker and Block, see Letter of Frank Bowman to Judge Diana E. Murphy, Chair, U.S. Sentencing Commission (Feb. 18, 2003) (on file with author and with U.S. Sentencing Commission).

<sup>83</sup> See Bowman, *2001 Sentencing Reforms*, *supra* note 80, at 25-29 (describing the perceived problems with the former loss definition).

<sup>84</sup> In 1998, the Justice Department and the Criminal Law Committee of the Judicial Conference (CLC) jointly proposed an amendment to the loss table that would have increased sentences for defendants causing losses of \$20,000 or greater. See Notice of Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Commentary, Part II, 63 Fed. Reg. 602 (Jan. 6, 1998).

<sup>85</sup> For the views of the CLC and its members on economic crime sentence severity, see *U.S. Sentencing Commission October 1997 Hearing on the Definition of “Loss”: Excerpts*, 10 FED. SENTENCING REP. 157, 161-62 (1997) (testimony of Judge Gerald Rosen) [hereinafter *1997 Hearing Excerpts*]; *Comments of Practitioners’ Advisory Group, Criminal Law Committee, and Probation*

probation officers<sup>86</sup> felt that, despite the incremental sentence increases for some categories of economic defendants between 1987 and the mid-1990s, sentences for some mid to high-level economic defendants remained too low in relation to the seriousness of their offenses. On the other hand, the defense bar saw no need to increase sentences, even for high-loss defendants.<sup>87</sup> And, a number of observers, both in and out of the defense bar, felt that the theft and fraud guidelines were too rigid for offenders who stole relatively small amounts, and that judges ought to be accorded more flexibility to impose probationary or alternative sentences on such offenders.<sup>88</sup>

The convergence of all these concerns produced a five-year collaboration, from 1996–2001, between all the institutions directly involved in federal sentencing—the Sentencing Commission, the judiciary, the Justice Department, the defense bar, and probation officers—to reform the economic crime guidelines. The detailed history of this long project, which produced the 2001 Economic Crime Package of guideline amendments, has been recounted elsewhere.<sup>89</sup> For present purposes, three points regarding the 2001 Economic Crime Package are most important.

First, the results.<sup>90</sup> The Commission consolidated the formerly separate theft and fraud guidelines into a single economic crime guideline, Section 2B1.1, that covers thefts, frauds, embezzlements, destruction of property, and receipt of stolen property.<sup>91</sup> The Commission amended the economic crime loss table,<sup>92</sup>

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*Officers Advisory Group on Proposed Changes to "Loss" Tables*, 13 FED. SENTENCING REP. 19, 20–21 (2000) (reprinting the modification of the loss table endorsed by the Criminal Law Committee). For a more complete explanation of the thinking of the Criminal Law Committee, see Catharine Goodwin, *Reconsideration of the Economic "Loss" Tables: Time for Meaningful Reform*, 9 GEO. MASON L. REV. 391 (2001); Catharine Goodwin, *The Case for a New Loss Table*, 13 FED. SENTENCING REP. 7 (2000) [hereinafter Goodwin, *The Case*].

<sup>86</sup> See, e.g., *1997 Hearing Excerpts*, *supra* note 85, at 158 (testimony of Gregory Hunt, chair of the Probation Officers Advisory Group, noting that "probation officers were quite effusive about the streamlining and increased severity of the loss table and they wholeheartedly support its adoption").

<sup>87</sup> See Barry Boss, *Do We Need to Increase the Sentences in White-Collar Cases? A View from the Trenches*, 10 FED. SENTENCING REP. 124 (1997); Barry Boss & Jude Wikramanayake, *Sentencing in White Collar Cases: Time Does Not Heal All Wounds*, 13 FED. SENTENCING REP. 15 (2000); James E. Felman, *Statement of Practitioners' Advisory Group on Proposed Changes to "Loss" Tables*, 13 FED. SENTENCING REP. 19 (2000).

<sup>88</sup> See Goodwin, *The Case*, *supra* note 85, at 12.

<sup>89</sup> Bowman, *2001 Sentencing Reforms*, *supra* note 80, *passim*.

<sup>90</sup> For two detailed accounts of the contents of the 2001 Economic Crime Package, see *id.* at 38–85, and John R. Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENTENCING REP. 263, 264–65 (2003).

<sup>91</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2001).

<sup>92</sup> Compare U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b), 2F1.1(b) (2000) with U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b) (2001).



rationalized the definition of loss,<sup>93</sup> and modified some specific offense characteristics.<sup>94</sup> The practical result was to slightly lower the sentences of some classes of low-loss offenders, while raising significantly the sentences of most mid- to high-loss offenders. The principal effect of the low-end decreases was to give judges discretion to impose probationary or alternative sentences in a larger proportion of relatively low-seriousness economic crime cases. The sentence increases were accomplished by modifying the loss table to raise offense levels for those causing loss in excess of \$70,000, by adding a new enhancement for offenses involving numerous victims,<sup>95</sup> and by redefining loss in a way that includes more kinds of harm in the loss calculation,<sup>96</sup> thus pushing up the number of offense levels awarded for loss in such cases.<sup>97</sup>

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<sup>93</sup> For details of the new loss definition, see Bowman, *2001 Sentencing Reforms*, *supra* note 80, at 47–81.

<sup>94</sup> *Id.* at 81–82.

<sup>95</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2) (2001). The new guideline also added an enhancement for making false statements to a consumer in connection with educational loans. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(7)(D) (2001).

<sup>96</sup> The core definition of loss under the former guidelines was “the value of the property taken, damaged, or destroyed.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, app. n.2 (2000). This definition implied a limitation to tangible or intangible property carried away, destroyed, or transferred to the possession of a defendant in the course of an offense. This definition was not only largely useless in fraud crimes, but also excluded from the sentencing calculus a variety of economic harms suffered by the victim that were perfectly foreseeable to the defendant when he committed the crime. The new definition is expressed in the language of causation. Loss is the “reasonably foreseeable pecuniary harm that resulted from the offense.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.2(A)(ii) (2001).

<sup>97</sup> The Economic Crime Package did contain one boon applicable to some mid- to high-loss defendants. Before 2001, the guideline for money laundering mandated very high sentences for virtually anyone sentenced under it, largely irrespective of the nature of the offense from which the money was derived and of the amount of money laundered. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2000) (setting the base offense level for money laundering at 20 or 23, depending on the statutory subsection under which the defendant was convicted, and adding some upward adjustments based on the amount of money laundered). Consequently, if a fraud defendant’s offense conduct contained acts that could be cast as money laundering, prosecutors had the option of including a money laundering count in the indictment and pushing the defendant’s sentence far higher than the fraud guideline would prescribe. Some prosecutors used this tool liberally, a practice that became the subject of widespread criticism. Critics noted that because the statutory definition of money laundering covers so many financial transactions, virtually any person guilty of a financial crime is likely to have done something that could be the subject of a money laundering charge. Hence, a defendant could, at the discretion of the prosecutor, be propelled into a dramatically higher sentence category that bore little relation to the nature of the crime for which he was really being prosecuted. The 2001 amendments ameliorated this difficulty by tying the offense level for money laundering more closely to the offense level of the underlying offense from which the laundered funds derived. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2001); see also ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK* 829 (2002) (explaining the effect of the 2001 amendments to the money laundering guidelines). The effect is not only to reduce the potential sentences of some defendants, but also to reduce the plea bargaining leverage of prosecutors who previously could threaten a money laundering charge to induce a plea to another offense. For a more complete discussion of the money laundering

The second key point about the Economic Crime Package is the process that produced it. It was, as a number of observers have suggested, an example of guidelines lawmaking as it was intended to work.<sup>98</sup> The Sentencing Commission had for many years been criticized for what appeared to those on the outside as closed and secretive processes. Situated in the judicial branch and thus not subject to the Administrative Procedures Act, the Commission and its staff could, and often did, formulate guideline changes quietly and debate and pass them at Commission meetings closed to the public. This is not to say that the Commission did not solicit input from interested persons and institutions. It did. Likewise, those on the outside with interest in sentencing policy were by no means barred from bringing their concerns to the Commission's attention. But the effect of the Commission's working methods was to create an impression, sometimes accurate, that the Commission did its work without full consultation with those on the outside most interested in and affected by that work.

The air of mystery hovering over Commission decisions was exacerbated by its custom of publishing amendments with little or no explanation of their rationale or intended effect. Each May, a bundle of guideline amendments would be announced and in November incorporated into the new edition of the Guidelines Manual, leaving the community of guidelines users—lawyers, probation officers, and judges—to speculate about why the rules had changed.

By contrast, the process that produced the 2001 Economic Crime Package was long, careful, open, and consultative. It extended for five years and included all of the stakeholders in economic crime sentencing—the Justice Department (which always has a seat at the Sentencing Commission table in the person of its *ex officio* member of the Commission), the judges speaking through the Criminal Law Committee of the Judicial Conference, the probation officers speaking both through the Probation Officers' Advisory Group and through employees of U.S. Probation on the permanent staff of the Commission, the defense bar speaking through the Practitioners' Advisory Group, and a ragtag handful of interested academics.<sup>99</sup> It involved studies, meetings, notice and comment, public hearings, endless drafting and redrafting of proposed language, debate in scholarly journals about the details and overall desirability of proposed reforms,<sup>100</sup> a "field test" of

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controversy and the 2001 money laundering amendments, see Bowman, *2001 Sentencing Reforms*, *supra* note 80, at 8, 31–32, 84–85.

<sup>98</sup> Hearing of U.S. Sentencing Commission, March 25, 2003 (testimony of James Felman, Co-Chair, Practitioners Advisory Group), *available at* [http://www.ussc.gov/hearings/3\\_25\\_03/032503TS.htm](http://www.ussc.gov/hearings/3_25_03/032503TS.htm).

<sup>99</sup> See Steer, *supra* note 90, at 264 ("The [Economic Crime Package] project was a collaborative effort involving the Department of Justice, the Criminal Law Committee of the Judicial Conference and many individual judges, federal probation officers, defense attorneys, and academic professionals.").

<sup>100</sup> For a detailed narrative of the history of the Economic Crime Package, see Bowman, *2001 Sentencing Reforms*, *supra* note 80, *passim*. For collections of articles and primary materials generated at the beginning and end of the process that produced the package, see *Rethinking "Loss"*

draft language which brought several dozen judges, probation officers, prosecutors, and defense lawyers to Washington to discuss the application of the draft to hypothetical cases,<sup>101</sup> and a national conference co-hosted by the Sentencing Commission, the Judicial Conference, the American Bar Association, and the National White Collar Crime Center.<sup>102</sup> Moreover, once the Commission finalized and passed the Economic Crime Package, it published a detailed set of explanations for the amendments.<sup>103</sup> In consequence, for the first time since 1987, a significant set of guideline amendments went out to the legal public accompanied by a usable legislative history.

Third, the Economic Crime Package was not only the product of an open consultative process, but its final content was agreed upon by all the interested parties. Though not everyone was delighted by every provision, the package was universally regarded as a well-crafted, balanced response to the tangle of knotty problems it set out to solve. The package passed by unanimous vote of the seven commissioners and with the expressed support of all the institutional actors, notably including the U.S. Department of Justice.<sup>104</sup>

As those involved in the effort recognized at the time, both the careful, respectful consultation that characterized the gestation period of the package and the ultimate consensus on its final form were facilitated by the low political profile of the reform process.<sup>105</sup> No one outside the legal system cared very much about sentences for federal economic criminals, or so it seemed. The political invisibility of economic crime sentencing lasted long enough to allow the passage of the 2001 package, but was soon to come to an abrupt and noisy end.

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in *Fraud and Theft Cases*, 10 FED. SENTENCING REP. 115–75 (1997), and *The Economic Crime Package: Resolving Issues of Severity, Definition, and Flexibility*, 13 FED. SENTENCING REP. 2–62 (2000).

<sup>101</sup> U.S. Sentencing Commission, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission*, available at <http://www.ussc.gov/publicat/Lossdefn.pdf> (last modified Oct. 20, 1998).

<sup>102</sup> See U.S. Sentencing Commission, *Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, October 12–13, 2000*, at <http://www.ussc.gov/2000sympo/symposium.htm> (last visited Feb. 23, 2004).

<sup>103</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 617, “Reason for Amendment” (2001).

<sup>104</sup> Minutes of U.S. Sentencing Commission meeting, Apr. 6, 2001, available at [http://www.ussc.gov/MINUTES/4\\_06\\_01.htm](http://www.ussc.gov/MINUTES/4_06_01.htm).

<sup>105</sup> As I wrote in 1997, “Paradoxically, the very complexity and technical difficulty of the ‘loss’ area of sentencing law may be the factor that makes meaningful reform possible. Although no question regarding the punishment of crime can (or should) ever be resolved in complete isolation from questions of sentencing philosophy, relatively few of the many disputes about the current economic crimes guidelines lend themselves to the ideological polarization and political posturing that have tended to paralyze efforts at substantive change to other areas of the guidelines.” Frank O. Bowman, III, *Back to Basics: Helping the Commission Solve the ‘Loss’ Mess with Old Familiar Tools*, 10 FED. SENTENCING REP. 115, 122 (1997).

## III. THE SARBANES-OXLEY ACT OF 2003

A. *A Legislative History of the Criminal Provisions of Sarbanes-Oxley*

On December 2, 2001, barely a month after the new economic crime guideline amendments became effective, the Enron Corporation filed the largest bankruptcy petition in U.S. history.<sup>106</sup> And Enron was only the first and most spectacular of what seemed an ever-widening flood of corporate scandal and collapse. World Com, Tyco, and Global Crossing<sup>107</sup> followed Enron onto the list of corporate behemoths either driven into bankruptcy or into perilous financial straits by market conditions, managerial error, cupidity, or outright theft.

In an earlier time, such corporate troubles might have roiled the financial community but remained to most Americans only a cautionary tale about the hubris of the indecently wealthy. But America has become, to a hitherto unprecedented degree, a nation of investors whose dreams of retirement for themselves and education for their children are intertwined with the fate of the stock of the corporations for which they work or of equity markets generally. These were huge corporations with many thousands of employees and other stakeholders across the nation. Thus, losses to investors, creditors, employees, and pensioners were in the billions.<sup>108</sup> The stock market, already in a two-year decline exacerbated by the September 11 attacks, slid still further.<sup>109</sup> Moreover, as the stories of these debacles unfolded during the first half of 2002, it seemed increasingly obvious that the institutions the country relied upon to guard against such occurrences had failed. Boards of directors seemed remarkably oblivious to the operation of the corporations they were paid large sums to direct. Outside auditors either missed or winked at egregious manipulations of corporate accounts. Lawyers appeared to facilitate questionable corporate dealings, rather than

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<sup>106</sup> See *Explaining the Enron Bankruptcy*, ASSOCIATED PRESS, Jan. 13, 2002, at <http://www.cnn.com/2002/US/01/12/enron.qanda.focus> (last visited June 12, 2003).

<sup>107</sup> See, e.g., 148 CONG. REC. H1540-04 (daily ed. Apr. 24, 2002) (remarks of Congresswoman Slaughter during debate on H. 3763 commenting on collapse of Global Crossing); 148 CONG. REC. H4434-01 (daily ed. July 10, 2002) (remarks of Congressman Clement discussing Enron, WorldCom, and Global Crossing as examples of corporate wrongdoing); 148 CONG. REC. H4864-01 (daily ed. July 17, 2002) (remarks of Congressman Scott McInnis discussing misconduct by executives of Enron, WorldCom, Tyco, and others).

<sup>108</sup> For example, the losses from the Enron collapse to one large pension fund, CalPers, the California Public Employees Retirement System, were reported to be \$580 million. See Press Conference, Senator Paul S. Sarbanes (D-Md.), Economic Impact of Corporate Irresponsibility (July 8, 2002), available at <http://www.senate.gov/~banking/pre102/0708corp.htm> (last visited Feb. 23, 2004).

<sup>109</sup> On September 21, 2001, the Dow Jones Industrial Average closed down 34% from its all-time high of 11,722 on January 14, 2000. The market slid still lower through the winter and spring of 2002, closing down another 500 points at 7,702 on July 23, 2002. See *History of Dow Jones Industrial Average*, available at <http://mdleasing.com/djia.htm>.

discouraging them or reporting them to the authorities. Stock brokers promoted securities of companies they privately regarded as junk.

The confluence of all these concerns would arouse the interest of the political classes under any circumstances, but corporate scandal had particular resonance in 2001–2002. Enron and the other scandals strongly suggested that something was amiss in the higher realms of American corporate life. Whether these were real and pervasive problems or whether 2001–2002 merely represented a temporary painful shakeout of the “dot.com” stock bubble, the perception of institutional weaknesses in American business was thought to threaten the stability of capital markets and the health of the economy.<sup>110</sup> Hence, it was widely perceived that something needed to be done to restore investor confidence.

On the political side, the White House and the House of Representatives were controlled by Republicans. The President and the dominant elements of the congressional Republican Party were unapologetically supportive of big business and identified in the public mind with the interests of corporate America. Congressional Democrats, being somewhat less allied to large corporate interests, perceived a potential chink in the political armor of an administration that had sought since September 11 to keep the nation’s attention focused on terrorism and national security. Thus, beginning in early 2002, congressional Democrats were in full cry against corporate malefactors. Congressional Republicans, too, responded to the wave of corporate scandal, but far more cautiously, expressing reluctance to interfere in markets and concern that congressional “overreaction” might be worse than no action at all.<sup>111</sup>

Because Democrats controlled the Senate, the most aggressive action in the first half of 2002 was there. Democratic senators explored both criminal and civil regulatory responses to the burgeoning scandal. Senator Patrick Leahy (D-Vt.), then the Chairman of the Senate Judiciary Committee, seems to have been particularly incensed by those aspects of the Enron affair involving allegations that the auditing firm Arthur Andersen destroyed Enron audit records despite being aware of an impending investigation.<sup>112</sup> On March 12, 2002, Senator Leahy introduced a bill, S. 2010, which created two new felonies applicable to persons

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<sup>110</sup> See, e.g., 148 CONG. REC. H1544-02 (daily ed. July 17, 2002) (remarks of Rep. Kanjorski); 148 CONG. REC. H1544-02 (daily ed. July 17, 2002) (remarks of Rep. Oxley).

<sup>111</sup> See, e.g., *The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearing on H.R. 3763 Before House Comm. on Fin. Serv.*, 107th Cong. 30–31 (2002) (statement of Rep. Oxley, Chair of the Committee), available at [http://commdocs.house.gov/committees/bank/hba78501.000/hba78501\\_of.htm](http://commdocs.house.gov/committees/bank/hba78501.000/hba78501_of.htm).

<sup>112</sup> In the legislative history of S. 2010 that Senator Leahy inserted in the Congressional Record, he referred to Arthur Andersen by name: “In light of the apparent massive document destruction by Andersen, and the company’s apparently misleading document retention policy, even in light of its prior SEC violations, it is intended that the SEC promulgate rules and regulations that require the retention of such substantive material, including material which casts doubt on the views expressed in the audit of review, for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations.” 148 CONG. REC. S7418-01 (daily ed. July 26, 2002).

who destroy or create evidence relevant to a federal investigation or who willfully fail to preserve audit records of companies which issue securities.<sup>113</sup> The bill required the SEC to issue regulations defining the classes of audit materials that must be retained.<sup>114</sup> It created a new substantive securities fraud offense.<sup>115</sup> It made debts incurred as a result of civil or criminal securities law judgments non-dischargeable in bankruptcy<sup>116</sup> and extended the statute of limitation on private securities fraud suits.<sup>117</sup> Finally, it required the Sentencing Commission to consider whether guideline penalty levels for obstruction of justice and serious fraud cases were adequate, and whether sentence enhancements should be added for offenses which endangered the solvency of numerous victims or which involved substantially more than fifty victims.<sup>118</sup> Senator Leahy's bill was reported out of the Judiciary Committee unanimously on May 6, 2002,<sup>119</sup> but then languished.

As summer approached, Senator Joseph Biden (D-Del.), Chairman of the Judiciary Committee's Subcommittee on Crime and Drugs, scheduled a series of hearings devoted to the topic "Are We Really Getting Tough on White Collar Crime?"<sup>120</sup> The first of these was held on June 19, 2002. The hearing featured two panels. The first consisted of citizen victims of the Enron collapse and a similar event involving a much smaller Delaware corporation. The second panel was made up of government officials and academic experts on economic crime prosecution and sentencing, and included an official spokesman of the Department of Justice, James B. Comey, Jr., the U.S. Attorney for the Southern District of New York.<sup>121</sup>

The second panel was remarkable principally for the general uniformity of views among the speakers. All agreed that "white collar crime" is a serious matter deserving of serious attention from the criminal justice system.<sup>122</sup> No one argued

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<sup>113</sup> S. 2010, 107th Cong. § 802 (2002); *see also Remarks of Mr. Leahy Upon Introduction of S. 2010 to the Senate*, available at 2002 WL 32054452 (Mar. 12, 2002).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 807.

<sup>116</sup> *Id.* § 803.

<sup>117</sup> *Id.* § 804.

<sup>118</sup> *Id.* § 805.

<sup>119</sup> S. 2010, 107th Cong. (2002), available at 2002 WL 32054447.

<sup>120</sup> *See Penalties for White Collar Crime Offenses: Are We Really Getting Tough on Crime?: Hearing on Penalties for White Collar Crime Before the S. Comm. on the Judiciary, Subcomm. on Crime and Drugs*, 107th Cong. 1-17 (2002), available at 15 FED. SENTENCING REP. 234, 236 (2003) [hereinafter *Judiciary Hearings*].

<sup>121</sup> Witnesses on the second panel were James B. Comey, Jr., U.S. Attorney, Southern District of New York; Glen B. Gainer, III, State Auditor of West Virginia; Bradley Skolnik, Securities Commissioner of Indiana; Paul Rosenzweig, Senior Research Fellow, The Heritage Foundation; and Frank O. Bowman, III, Indiana University School of Law-Indianapolis. *Id.* at 17-41.

<sup>122</sup> *See, e.g., The Genesis of the Sentencing Provisions of the Sarbanes-Oxley Act*, "Are we Really Getting Tough on White Collar Crime?", *Hearing Before the Subcomm. on Crime and Drugs*,

that penalties for serious economic crimes were too low under federal law. Significantly in light of later events, Mr. Comey expressed the Justice Department's general satisfaction with the 2001 Economic Crime Package, saying, "We believe the Economic Crime Package generally improved and furthered federal sentencing policy . . . [and] the changes made by the Package are consistent with the principles of appropriate certainty and severity and are generally a step in the right direction."<sup>123</sup> The one reservation expressed by the Department about the 2001 amendments related to their slight relaxation of sentence levels for defendants responsible for losses less than \$70,000.<sup>124</sup> In short, though the impetus for and focus of the June 19, 2002 hearing were the crimes of corporate titans like the executives of Enron, the Justice Department uttered no word of complaint about then-current sentencing levels for serious white collar offenders, expressing instead a muted concern about sentences for economic criminals at the low end of the seriousness scale.<sup>125</sup> If any dominant theme emerged from the June 19 hearing, it was that more investigative and prosecutorial resources, not higher penalties, were the key to "getting tough" on white collar crime.<sup>126</sup>

On the regulatory/corporate governance front, both the House Financial Services Committee and Senate Banking Committee developed legislation during the first half of 2002. The chairman of the House Financial Services Committee, Rep. Michael Oxley (R-Ohio), got out ahead of the pack. In February, he introduced the "Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002" (CARTA),<sup>127</sup> scheduled a series of hearings on the bill

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107th Cong., available at 15 FED. SENTENCING REP. 234 (2003) [hereinafter *Getting Tough Hearing*] (statement of James B. Comey, Jr., United States Attorney for the Southern District of New York) ("White collar criminals have broken serious laws, done grave harm to real people—like the people who just testified—should be subject to the same serious treatment that we accord all serious crimes: substantial periods of incarceration."). The views of Heritage Foundation Fellow Paul Rosenzweig can be read as a partial dissent from consensus on this point. While not disagreeing with the idea that frauds and swindles are properly treated as serious crimes, he argued that some federal statutes improperly criminalize some business behavior which is, at worst, negligent or an exercise of bad judgment. See *Judiciary Hearings*, *supra* note 120, at 26–29, 72–74, 144–55.

<sup>123</sup> See *Judiciary Hearings*, *supra* note 120, at 106–70.

<sup>124</sup> *Id.*

<sup>125</sup> The Justice Department maintained this same posture in its responses to post-hearing written questions from Judiciary Committee Senators, expressing satisfaction with the high-loss sentence increases in the 2001 Economic Crime Package, and concern about sentences for fraud cases involving less than \$70,000. See Letter from Daniel J. Bryant, Assistant Attorney General, to Hon. Patrick J. Leahy (Nov. 26, 2002) and attached Responses to Questions Submitted by Members of the Committee, *reprinted in Judiciary Hearings*, *supra* note 120, at 49, 51.

<sup>126</sup> See, e.g., Frank O. Bowman, III, *Summer 2002: The Genesis of the Sentencing Provisions of the Sarbanes-Oxley Act "Are We Really Getting Tough on White Collar Crime?"*, 15 FED. SENTENCING REP. 237, 241 (2003); see also *Judiciary Hearings*, *supra* note 120, at 30–41 (colloquy between Senator Biden and witnesses).

<sup>127</sup> Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002 (CARTA), H.R. 3763, 107th Cong. (2002) [hereinafter CARTA].

during March and April,<sup>128</sup> and secured passage of the bill by the House on April 24, 2002. The principal feature of CARTA was the requirement that auditors of publicly traded corporations “be subject to a system of review by a public regulatory organization,” which would have to be in compliance with rules formulated by the SEC.<sup>129</sup> Although this sounds like the Public Company Accounting Oversight Board that later emerged from the Sarbanes-Oxley Act,<sup>130</sup> the regulatory authority described in CARTA was a markedly different animal. First, although the bill spoke of a “public regulatory organization,” the organization was not to be a government agency, nor would its membership be controlled by the government. Second, CARTA did not require the creation of a single oversight entity, but clearly envisioned the emergence of multiple entities that might be recognized by the SEC.<sup>131</sup> Third, the task of defining structure, authority, and scope of these oversight entities was left almost entirely to the SEC as a rulemaking function.<sup>132</sup>

In addition to mandating some increased regulation of public auditors, CARTA included a prohibition against independent auditors of publicly traded companies offering certain kinds of non-audit services,<sup>133</sup> a prohibition against exercising improper influence on the conduct of outside audits,<sup>134</sup> a requirement of “real time” disclosure of financial information,<sup>135</sup> a prohibition of insider trades during pension fund blackout periods,<sup>136</sup> and a series of congressional mandates for “studies” of analyst conflicts of interest,<sup>137</sup> corporate governance practices,<sup>138</sup> SEC enforcement actions,<sup>139</sup> and credit rating agencies.<sup>140</sup>

House Democrats found some things to praise in CARTA, but felt it was unduly deferential to the interests of the auditing industry, corporate management, and the financial industry. They proposed an alternative, H.R. 3818 (the “Comprehensive Investor Protection Act of 2002”), with more teeth.<sup>141</sup> Among its

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<sup>128</sup> See *Hearings on H.R. 3763 Before the House Committee on Financial Services*, Mar. 13, 2002, Mar. 20, 2002, and Apr. 9, 2002, 107th Cong. (2002).

<sup>129</sup> CARTA, *supra* note 127, at § 2.

<sup>130</sup> Sarbanes-Oxley, *supra* note 13, at § 101.

<sup>131</sup> CARTA, *supra* note 127, at § 2.

<sup>132</sup> *Id.* § 2.

<sup>133</sup> *Id.* § 2(c).

<sup>134</sup> *Id.* § 3.

<sup>135</sup> *Id.* § 4.

<sup>136</sup> *Id.* § 5.

<sup>137</sup> *Id.* § 7.

<sup>138</sup> *Id.* § 9.

<sup>139</sup> *Id.* § 10.

<sup>140</sup> *Id.* § 12.

<sup>141</sup> Comprehensive Investor Protection Act of 2002, H.R. 3818, 107th Cong. (2002) (introduced on Feb. 28, 2002).



notable differences with the Republican bill were the creation of a single national accounting oversight board under the direct supervision of the SEC with specific legislative grants of authority,<sup>142</sup> stringent requirements of independence of members of the accounting oversight board from the large public accounting firms,<sup>143</sup> a wider ban on non-audit services by auditing firms for corporations they audit,<sup>144</sup> a ban on tying investment analyst compensation to the performance of the investment bank for which they work,<sup>145</sup> criminal penalties for destruction of audit records,<sup>146</sup> and a substantial increase in the SEC's enforcement budget.<sup>147</sup> On the floor of the House, CARTA passed as written by the Republicans. Moreover, the Republicans turned back, on nearly straight party-line votes, a series of Democratic amendments to toughen the legislation.<sup>148</sup> Included in these rejected amendments were provisions requiring corporate executives to certify financial statements and imposing criminal penalties for false certifications of financial reports.<sup>149</sup>

In 2002, Democratic Senators were also pressing for action relating to internal and external mechanisms of corporate regulation and governance. In January, Senator Paul Sarbanes (D-Maryland), then the Chairman of the Senate Banking Committee, requested the General Accounting Office to investigate the "proliferation of restatements of earnings and other financial data which have been issued in recent years by publicly traded companies."<sup>150</sup> The Banking Committee held hearings during the spring<sup>151</sup> and by June 18 had reported out the "Public Company Accounting Reform and Investor Protection Act of 2002."<sup>152</sup> Sarbanes' bill was plainly tougher than the House bill and contained a number of the

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<sup>142</sup> *Id.* § 4.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* § 2.

<sup>145</sup> *Id.* § 16.

<sup>146</sup> *Id.* § 15.

<sup>147</sup> *Id.* § 10; see also *The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearing of H.R. 3763 Before the House Comm. of Fin. Serv.*, 107th Cong. 141-143 (2002) (testimony of Damon A. Silvers, Associate General Counsel, AFL-CIO).

<sup>148</sup> 148 CONG. REC. H1540-92 (daily ed. Apr. 24, 2002), available at 2002 WL 32054453.

<sup>149</sup> *Id.*

<sup>150</sup> See Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Sarbanes Seeking Probe Into "Restatements of Earning" (Jan. 23, 2002), available at <http://banking.senate.gov/pre102/0123rest.htm> (last visited Jan. 6, 2004).

<sup>151</sup> The Senate Banking Committee held hearings on accounting, investor protection, and corporate governance issues on February 12, 14, 26, and 27, 2002, and on March 5, 6, 14, 19, 20, and 21, 2002. For witness statements, see <http://banking.senate.gov/hrg02.htm#jan02>; see also S. REP. No. 107-205 (2002).

<sup>152</sup> Senator Sarbanes asserted that the bill would "strengthen corporate accountability and auditor integrity; address conflicts of interests by stock analysts; and protect employees, pension holders, and investors against fraud and deception; as well as adding a major increase in funds for the SEC to help police corporate malfeasance." See Senator Paul Sarbanes, *Transcript of Democratic Response to the President's Radio Address* (June 29, 2002), available at 2002 WL 1399251.

provisions sought by House Democrats.<sup>153</sup> In particular, it envisioned a single national accounting oversight board with a membership chosen by the SEC, and gave the board markedly more regulatory authority than would the House Republicans.<sup>154</sup> The shifting momentum of the debate is revealed by the fact that the Sarbanes bill passed out of the Senate Banking Committee on a vote of 17-4, with six of ten Republican senators joining all the Democrats in voting for the bill.<sup>155</sup> On July 8, 2002, the full Senate began consideration of the Sarbanes bill.<sup>156</sup>

The very next day, July 9, 2002, President Bush entered the fray with a speech delivered on Wall Street.<sup>157</sup> The President's speech repays close inspection. Politically, it was an effort to get the Administration back out in front of a debate that had passed the White House by and threatened to leave the President cast as either indifferent to corporate malfeasance, or worse still, as an apologist for the business interests allied with the Republican party. Substantively, the White House confronted gathering congressional momentum to pass the Democrat-initiated Senate version of reform legislation, with its greater emphasis on regulation of corporate governance and oversight of the operation of capital markets. Against this backdrop, consider the components of the speech.

First, President Bush's dominant theme was that the American economy is strong and its business leaders as a class are men and women of integrity. The corporate scandals of 2001-2002 were portrayed, not as the result of major systemic flaws, but as ethical failures on the part of a relatively few crooked individuals and companies "disconnected from the values of our country."<sup>158</sup> Thus, the President's first prescription was a call "for a new ethic of personal responsibility in the business community" and commitments by business leaders and stock exchanges to self-regulation.<sup>159</sup>

Second, in keeping with the emphasis on moral failure, the list of governmental actions proposed by the President was headed by a call for increased enforcement of criminal laws and for "tough new criminal penalties for corporate

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<sup>153</sup> For example, the Sarbanes bill included tough restrictions on performance of non-audit services by auditing firms for corporations being audited, S. 2673, 107th Cong. § 201 (2002), a requirement that public accounting firms rotate their lead and reviewing audit partners for a client corporation at least every five years, S. 2673, 107th Cong. § 203 (2002), and a requirement that the financial statements of publicly traded companies filed with the SEC be certified by the chief executive officer and chief financial officer, S. 2673, 107th Cong. § 302 (2002), *available at* 2002 WL 32054448.

<sup>154</sup> *See* S. 2673, 107th Cong. Title I (2002) (Public Company Accounting Oversight Board), *available at* 2002 WL 32054448.

<sup>155</sup> *See* S. REP. No. 107-205 at 2 (2002), *available at* <http://www.nctr.org/content/indexpg/washup/up20020701.htm>.

<sup>156</sup> *See id.*

<sup>157</sup> For text of speech, *see* George Bush, *Corporate Crime*, 15 FED. SENTENCING REP. 242 (2003).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

fraud.”<sup>160</sup> Interestingly, however, the President’s only specific proposal for increasing penalties was to double the statutory maximum sentence for financial fraud, by which he presumably meant the mail and wire fraud statutes, from five to ten years.<sup>161</sup> As noted above, in multi-count fraud cases, the statutory maximum sentence is essentially irrelevant to the determination of a defendant’s actual sentence.

When the President finally arrived at the subject of specific proposals for government regulatory action, his agenda was notably sparse.<sup>162</sup> He said nothing specific about the proposal for a new accounting standards board. He did, however, make a point of praising the House bill, while saying of the Senate only that it “needs to act quickly and responsibly so I can sign a good bill into law.”<sup>163</sup>

In retrospect, the White House strategy seems reasonably clear. It wanted to be seen as leading the charge against corporate misdeeds, rather than enabling them. But it strongly preferred the cautious approach of the House bill to the Senate’s insistence on increased regulation and more aggressive government oversight of securities markets, accounting rules, and mechanisms of corporate governance. It is difficult to avoid the conclusion that Administration strategists consciously chose to cast the 2001–2002 surge of corporate scandal as an outbreak of crime, rather than as a failure of civil mechanisms for controlling securities markets and corporate behavior, in order to counteract the gathering momentum for sweeping regulatory reform.<sup>164</sup>

Whatever the underlying strategy, the President’s speech had an immediate effect on the Department of Justice’s approach to economic crime penalties. On July 10, 2002, the day after the President’s Wall Street speech, Assistant Attorney General Michael Chertoff, head of the Justice Department’s Criminal Division, testified before Senator Biden’s Subcommittee on Crime and Drugs. He confirmed that criminal enforcement was central to the Bush Administration’s approach to corporate misbehavior, saying, “Strong enforcement of our laws against white collar crime, and tough penalties for those who commit such crimes, has been this Administration’s policy, and these principles form the cornerstones of the President’s proposal.”<sup>165</sup> Mr. Chertoff touted the Justice Department Corporate

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<sup>160</sup> *Id.* at 242–43.

<sup>161</sup> *Id.*

<sup>162</sup> The President endorsed several Wall Street proposals for self-regulation, urged adoption of measures to ease seizure and forfeiture of improper payments or benefits to corporate executives, advocated a requirement that top corporate officers certify the accuracy of corporate financial statements, and endorsed tougher conflict of interest rules for stockbrokers and financial advisers. *Id.*

<sup>163</sup> *Id.* at 243.

<sup>164</sup> Other commentators have espoused this view. See, e.g., Stephen Labaton, *Seemingly Close to Nominee, S.E.C. Search is Back to Start*, N.Y. TIMES, Nov. 15, 2002, at A1 (stating that the administration’s use of vigorous prosecution was a tool to blunt call for tougher regulation).

<sup>165</sup> *Judiciary Hearings*, *supra* note 120, at 167–75 (testimony of Michael Chertoff).

Fraud Task Force announced in the President's speech, and then reiterated the President's call to increase the maximum sentences for mail and wire fraud.<sup>166</sup>

This push for increased severity of white collar punishment seemed at odds with the Department's announced satisfaction with high-end punishment under the Economic Crime Package only three weeks before. However, given that statutory maximum sentences have no necessary effect on real sentences, Chertoff's statement did not necessarily represent a substantive change in Justice Department position. An increased statutory maximum sentence is merely a symbolic expression of legislative concern in the absence of corresponding change in the Sentencing Guidelines. Whatever the Justice Department's original intentions in July 2002, as we will see the argument for increased statutory maximum sentences was soon transmuted into an aggressive campaign for guideline amendments ratcheting up real sentences for all economic crime offenders.<sup>167</sup>

For just over two weeks following the President's speech, Congress engaged in furious negotiations about the shape of legislation now generally understood to be inevitable. For purposes of this Article, the details of the wrangling over the civil regulatory side of the final product are not essential. In broad outline, however, Democrats pushed for more aggressive intervention in the regulation of accounting practices, the marketing of securities, and corporate governance, while congressional Republicans and the Administration favored an outcome closer to the cautious approach of Congressman Oxley's House bill. At the same time, Republicans began to compete with Democrats in offering ever-tougher proposals for criminal legislation.<sup>168</sup> For example, on July 10, 2002, Senator Hatch (R-Utah) joined Senator Biden (D-Del.) in offering S. 2717, raising the statutory maximum sentence for mail and wire fraud, as well as for the general federal conspiracy statute, 18 U.S.C. § 371, from five years to ten years.<sup>169</sup>

On July 15, 2002, Congressman Sensenbrenner (R-Wis.) and other House Republicans produced a bill (H.R. 5118, separate from Congressman Oxley's CARTA legislation) upping the ante to twenty years for these offenses and creating a new securities fraud offense with a maximum sentence of twenty-five years.<sup>170</sup> This bill was introduced, jointly referred to the Judiciary and Financial Services

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<sup>166</sup> See *id.*

<sup>167</sup> See *infra* notes 240–71 and accompanying text.

<sup>168</sup> See, e.g., Ted Barrett, *House Votes to Boost Corporate Crime Penalties: 'Real Time' Vowed for Corporate Criminals*, July 16, 2002, available at <http://www.cnn.com/2002/ALLPOLITICS/07/16/house.corporations/> (last visited Feb. 22, 2004) (quoting Rep. John LaFalce (D-N.Y.), the ranking Democrat on the House Financial Services Committee, as describing the House Republicans as "playing catch-up football" and criticizing the Republican-drafted House bill "as 'a diversionary tactic for the media,' designed to turn attention away from other parts of the House corporate reform bill that Democrats argue is too weak").

<sup>169</sup> S. 2717, 107th Cong. (2002); see also, Remarks of Senator Joseph Biden, 148 CONG. REC. S7426–27, July 26, 2002 (describing contents of S. 2717).

<sup>170</sup> H. Res. 5118, 107th Cong., 148 CONG. REC. H4683–94 (daily ed. July 16, 2002) (enacted).

Committees, and voted out of committee on the same day.<sup>171</sup> It was brought to the House floor and passed the following day, July 16, 2002.<sup>172</sup>

While the quantum leaps in statutory maximum sentences may have stemmed from genuine outrage over corporate misdeeds, House Republicans repeatedly invoked them to deflect Democratic criticism of the relatively weak regulatory provisions of the House bill. A striking example of this phenomenon occurred during a July 17, 2002 debate on the House floor.<sup>173</sup> Congressman John Dingell (D-Mich.) spoke at length decrying the weakness of the regulatory provisions of the House bill in comparison to its Senate counterpart. The responses of Congressman Oxley (R-Ohio), Congressman Ney (R-Ohio), and Congressman Baker (R-La.) scarcely mention the regulatory provisions of the House bill, dwelling instead on the sentence increases and citing them as proof that the Republican approach was “stronger” than the Sarbanes bill in the Senate.<sup>174</sup> The Republican emphasis on criminal rather than civil regulatory responses continued throughout the remaining debate on Sarbanes-Oxley.<sup>175</sup>

In its final form, Sarbanes-Oxley contained regulatory provisions stronger than the White House or House Republicans had wanted,<sup>176</sup> along with virtually all the enhanced criminal penalty provisions thought up by Republicans and Democrats in both houses.<sup>177</sup> We will turn to the details of the criminal provisions

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<sup>171</sup> 148 CONG. REC. H4683–94 (daily ed. July 16, 2002).

<sup>172</sup> *Id.*

<sup>173</sup> The occasion for the debate was a motion by Rep. Conyers (D-Mich.) to instruct House conferees to agree to certain provisions of the Sarbanes bill that had just passed the Senate. 148 CONG. REC. H4838 (daily ed. July 17, 2002).

<sup>174</sup> 148 CONG. REC. H4843–44 (daily ed. July 17, 2002). Indeed, the sequence of statements by Oxley, Ney, and Baker is so well-coordinated as to suggest a preconceived debating strategy.

<sup>175</sup> *See, e.g.*, 148 CONG. REC. H5462 (daily ed. July 25, 2002) (floor statement of Rep. Cox (R-Fla.), recommending that the House adhere to the twenty year statutory maximum sentences it passed, rather than the ten-year maximum passed by the Senate).

<sup>176</sup> Rep. LaFalce (D-N.Y.), then ranking Democrat on the House Financial Services Committee said of the final product: “I am particularly gratified that the final bill includes many of the provisions that I first introduced in the House and called for as early as last year. The centerpiece of this bill is the creation of a strong independent oversight board for the accounting industry. As with the oversight board in my bill, the oversight board included in the final conference report will be independently funded and will have strong disciplinary, investigatory, and, most importantly, standard-setting powers.” *Id.*

<sup>177</sup> A few criminal provisions of the bills that went to conference committee did not survive into the final legislation. For example, Section 7 of Rep. Sensenbrenner’s H.R. 5118 would have created a new consolidated federal conspiracy and attempt statute, 18 U.S.C. § 1: “Any person who attempts or conspires to commit any offense against the United States shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

As I wrote to the House and Senate Judiciary Committees at the time:

of Sarbanes-Oxley in a moment, but it is worth pausing to observe that the Republican effort to divert legislative energy from civil regulatory to punitive criminal measures largely failed. Although legislators seeking a strong regulatory response to corporate scandals may not have gotten everything they wanted, they got most of it—and far more than either the House (and many Senate) Republicans or the White House would have preferred. Moreover, once the Republicans entered the competition to see who could create the toughest criminal sanctions, there was no turning back. The ironic result was that by adopting the White House diversionary strategy of focusing on criminal remedies, the Republican leadership, which originally sought relatively weak regulation and no additional criminal penalties for corporate wrongdoers, was ultimately obliged to accede to legislation containing both relatively strong regulatory remedies and potentially very punitive criminal provisions.

#### *B. The Details of the Criminal Provisions of the Sarbanes-Oxley Act*

The principal criminal provisions of Sarbanes-Oxley are contained in Titles VIII, IX, and XI of the Act.<sup>178</sup> Title VIII is drawn directly from Senator Leahy's S. 2010. Title IX is drawn from S. 2717, the bill introduced by Senators Biden and

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First, . . . there is already a general conspiracy statute in Title 18 (18 U.S.C. § 371) which provides for a penalty of five years per count of conviction. Thus, passage of the House bill would create conflicting general conspiracy statutes.

Second, there is not currently a general federal attempt statute. The creation of such a statute would, in my view, be desirable. However, a statute with such general application should only be inserted into the federal code after careful deliberation about its precise form and possible effects. It seems unlikely that such deliberation will be possible in the time frame available for the present legislation.

Third, in its present form, the House attempt provision raises at least one substantive concern. It provides that attempts shall be punished equally with completed offenses. While there are existing provisions of federal criminal law which embody this rule of equivalent punishment for some types of attempt (notably drug crimes, *see* 21 U.S.C. § 846), there are also Sentencing Guidelines providing somewhat lower penalties for attempts than for completed crimes (*see* U.S. SENTENCING GUIDELINES MANUAL § 2X1.1). Many, perhaps most, states provide lower penalties for attempts than for completed offenses. Which is the best approach is a question beyond the scope of this discussion, but it is a question that would seem to require some careful consideration before one conclusion or the other is embodied in a federal statute applicable to all federal crimes. If what is desired is to insure criminal liability for attempts to commit the newly created offenses in this bill, a sensible approach would be to include attempt language in each newly created offense.

Frank O. Bowman, III, Analysis of Criminal Provisions of Senate and House Bills on Corporate and Accounting Fraud, July 17, 2002 (on file with author).

<sup>178</sup> *See* Sarbanes-Oxley, *supra* note 13; *see also* *The Sarbanes-Oxley Act: Sentencing Provisions*, 15 FED. SENTENCING REP. 254 (2003) (gathering criminal provisions of the Act).

Hatch. Title XI is drawn from H.R. 5118, the bill introduced by Congressman Sensenbrenner. Each of these three free-standing bills had some unique provisions, but they duplicated one another at some points and were somewhat inconsistent at others. Due to the haste with which the final Sarbanes-Oxley legislation was assembled, Congress made no serious attempt to harmonize the three different precursor bills. Instead, Congress simply eliminated some (but by no means all) of the most obvious duplications and inconsistencies and inserted all three bills into the final legislation, giving each its own title.

### 1. New Substantive Offenses

Title VIII of Sarbanes-Oxley creates three new substantive offenses. The first prohibits destruction, alteration, or falsification of records “with the intent to impede, obstruct, or influence” federal investigations or bankruptcy proceedings, on pain of twenty years imprisonment.<sup>179</sup> The second requires accountants who audit publicly traded companies to maintain “all audit or review workpapers” for five years, and makes willful failure to do so a crime punishable by up to ten years imprisonment.<sup>180</sup> The third is a new, less technical, securities fraud offense with a maximum sentence of twenty-five years.<sup>181</sup>

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<sup>179</sup> Sarbanes-Oxley § 802 (codified at 18 U.S.C. § 1519).

<sup>180</sup> *Id.* § 1520. Section 802(a)(2) requires the Securities and Exchange Commission to promulgate rules and regulations governing records retention.

<sup>181</sup> *Id.* § 807 (codified at 18 U.S.C. § 1348). The new statute reads as follows:

§ 1348. Securities Fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

- (1) to defraud any person in connection with any security of an issuer with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d)); or
- (2) (a) to obtain by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any security of an issuer with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d)); shall be fined under this title, or imprisoned not more than 25 years, or both.

The Senate Report on S. 2010 describes the new offense and its rationale as follows:

This provision would create a new 10-year felony [in the form that passed into law, the penalty was increased to 25 years] for defrauding shareholders of public companies. The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to current bank fraud and health care fraud statutes.

The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. No. 107-146 (2002).

Title IX adds one new substantive criminal provision, requiring that the chief executive officer and chief financial officer of all publicly traded corporations certify the accuracy of company financial statements filed with the SEC. It imposes criminal penalties of ten years imprisonment and a \$1 million dollar fine for a “knowing” violation of the certification requirement, and twenty years imprisonment and a \$5 million fine for a “willful” violation.<sup>182</sup>

Title XI amends 18 U.S.C. § 1512 to add a new section 1512(c), which makes it a 20-year felony to (1) corruptly alter, destroy, mutilate, or conceal a record, document, or other object “with intent to impair the object’s integrity or availability for use in an official proceeding,” or (2) otherwise corruptly obstruct, influence, or impede any official proceeding, or attempt to do so.<sup>183</sup>

Only two of these five “new” substantive criminal statutes—the requirements of preservation of audit records by accountants and certification of financial statements by corporate officers on pain of prison—arguably effect a meaningful extension of already existing criminal liability.<sup>184</sup> By contrast, Sections 802 and 1102 relating to obstruction of justice are largely duplicative both of each other and of the numerous existing obstruction of justice statutes, such as 18 U.S.C. §§ 1501-1518. Section 807 may make criminal securities fraud cases slightly easier to bring, but it does not materially expand the reach of previous law.

## 2. Increased Maximum Penalties for Existing Offenses

As noted above,<sup>185</sup> in the weeks prior to Sarbanes-Oxley’s enactment, a bidding war broke out between the House and Senate in which each chamber vied for the honor of raising statutory maximum sentences for fraud-related crimes the farthest. During the reconciliation process, the conferees simply accepted whichever figure was highest. Consequently, when the gavel finally came down on Sarbanes-Oxley, the per-count statutory maximum sentence for mail fraud and wire fraud was increased from five years to twenty years.<sup>186</sup> The Act also increased the maximum sentence for conspiracies to commit the most common

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<sup>182</sup> Sarbanes-Oxley § 906 (codified at 18 U.S.C. § 1350). See Joseph Biden, *Certifying Statements under Section 906 of the Sarbanes-Oxley Act: Holding Corporate Executives Accountable for the Accuracy of Corporate Financial Statements*, 15 FED. SENTENCING REP. 257 (2003) (explaining of the provisions of and rationale for Section 906 by the originator of the legislation).

<sup>183</sup> *Id.* § 1102 (codified at 18 U.S.C. § 1512(c)).

<sup>184</sup> And even these two were hardly revolutionary. Even before Sarbanes-Oxley, auditors could be prosecuted for obstructing justice by destroying records, as the Arthur Andersen case graphically demonstrated. Likewise, the CEO and CFO certification requirement makes it harder for corporate executives charged with fraud to claim ignorance of their corporation’s public filings, but the “I have no idea how that extra \$100 million slipped into the quarterly earnings” defense was never a great strategy even before the new law.

<sup>185</sup> See *supra* notes 171–76 and accompanying text.

<sup>186</sup> Sarbanes-Oxley § 903.



forms of fraud,<sup>187</sup> and raised from one to ten years the maximum sentence for a criminal violation of the Employee Retirement Income Security Act of 1974 (ERISA).<sup>188</sup> Finally, the Act raised the maximum sentence for violation of Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a), from ten years to twenty years.<sup>189</sup>

### 3. Legislative Directives to the U.S. Sentencing Commission

As noted above, raising the statutory maximum sentence of a federal crime has no necessary effect on any actual sentence.<sup>190</sup> Because almost all serious frauds are chargeable in multiple counts, it is the applicable sentencing guidelines and not the statutory maximum per-count sentence that determines the time a federal economic crime defendant will actually serve. And the Guidelines have no necessary relation to the statutory maximum sentence of the offense of conviction.

Thus, an increase in a federal statutory maximum sentence is almost purely symbolic absent a corresponding change in the applicable guideline. This point was routinely ignored in congressional floor debates and public statements in favor of rhetoric equating increases in statutory maxima with increases in actual sentences,<sup>191</sup> but those drafting the criminal provisions of Sarbanes-Oxley were aware of it.<sup>192</sup> All three criminal titles of Sarbanes-Oxley contain directives to the U.S. Sentencing Commission.<sup>193</sup> One would expect (or at least hope) to find in these directives reasonably explicit guidance to the Sentencing Commission about what effect Congress really wanted the Act to have on economic crime sentences.

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<sup>187</sup> *Id.* § 902. Section 902 adds a new section, 18 U.S.C. § 1349, which increases the maximum sentence for attempts and conspiracies to commit fraud crimes from the former five years under the general conspiracy statute, 18 U.S.C. § 371, to the new higher penalty prescribed for whichever fraud offense was the object of the conspiracy or attempt.

<sup>188</sup> *Id.* § 904.

<sup>189</sup> *Id.* § 1106.

<sup>190</sup> See *supra* notes 75–77 and accompanying text.

<sup>191</sup> See *supra* notes 180–81 and accompanying text; see also Remarks of Rep. Oxley (R-Ohio) during House debate on Sarbanes-Oxley conference report, July 25, 2002, 148 CONG. REC. H5462–80 (“Investors can be assured that convicted corporate criminals will be sentenced to long jail time. In my view, the prospect of doing time, real time, will serve as an effective deterrent to wrongdoing in the corporate suite.”); *Corporate Criminals*, Remarks by Mr. Pitts in the House, July 17, 2002, 148 CONG. REC. H4771 (“Yesterday, the House voted for a new law to severely punish corporate crooks for their crimes.”).

<sup>192</sup> See, e.g., *Responses to Written Questions Following Hearing of June 19, 2002: Hearing Before S. Judiciary Comm., Subcomm. on Crime and Drugs*, 107th Cong. 42–43 (2002) (statement of Frank O. Bowman, III), (“[T]he provisions in both the House and Senate accounting reform bills [the precursors to Sarbanes-Oxley] that raise statutory maximum sentences for various economic crime offenses are of symbolic importance, but will effect no change in actual criminal sentences for economic offenders.”).

<sup>193</sup> Sarbanes-Oxley §§ 805, 905.

Unfortunately, it is in these directives that the hasty, cut-and-paste character of Sarbanes-Oxley shows most clearly.

The three criminal sections contain both specific and general directives to the Sentencing Commission. Section 805 contains explicit rifle-shot directives to the Commission to create particular enhancements for narrow classes of offenders or conduct.<sup>194</sup> Section 905 contains only general directives. Section 1104 contains both specific and general directives. Careful reading of these sections suggests three points.

First, a number of the specific directives reflect a striking unfamiliarity with, or indifference to, existing federal sentencing law and experience, and illustrate the undesirability of Congress attempting to write particular guidelines language. For example, Section 805(a)(2)(B) requires the Commission to:

ensure that . . . (2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—(B) *the offense involved abuse of a special skill or a position of trust . . .*

The idea of requiring an enhancement where “the offense involved abuse of a special skill or a position of trust” is unremarkable. The problem is that the pre-Sarbanes-Oxley guidelines already did so. Section 3B1.3 imposes a two-level sentence enhancement in any case, including obstruction cases, in which the defendant “abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or concealment of the offense.”

Of course, ordering the Sentencing Commission to do something it had long since done is essentially harmless. Less harmless is ordering the Commission to repeat a mistake it had already recognized and corrected. Section 805(a)(2)(A) requires the Commission to:

ensure that . . . (2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—(A) the destruction, alteration or fabrication of evidence involves—(i) a *large amount of evidence*, a large number of participants, or is otherwise extensive; (ii) the *selection of evidence that is particularly probative or essential* to the investigation; or (iii) *more than minimal planning . . .*<sup>195</sup>

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<sup>194</sup> *Id.* § 1104. Section 1104 directs the Commission to consider specific sentence enhancements for officers or directors of publicly traded corporations, for obstruction of justice cases in which documents or physical evidence are destroyed or fabricated, and for cases with “significantly” more than fifty victims.

<sup>195</sup> *Id.* § 805 (emphasis added).

The phrase “more than minimal planning” was found in the pre-2001 version of the economic crime guidelines.<sup>196</sup> It was the source of incessant criticism from courts and commentators because “more than minimal planning” was so loosely defined that the adjustment had to be litigated in virtually every economic crime case and was imposed in 70–80% of fraud and theft cases involving more than \$5000 in loss.<sup>197</sup> In 2001, the Commission eliminated the “more than minimal planning” adjustment from the new consolidated economic crime guideline. It built the extra two levels into the structure of the fraud table itself for medium-to-high-loss cases, and accounted for defendants who engage in unusually extensive criminal planning by adding an upward adjustment for the relatively small number of cases involving “sophisticated means.”<sup>198</sup> Nothing in the legislative history of Section 805 provides any indication of what “more than minimal planning” would mean in an obstruction of justice case, or why Congress would want to reintroduce, solely in obstruction of justice cases, a perennially troublesome concept the Sentencing Commission had just finished removing from fraud sentencing.

In the guidelines amendments responsive to Sarbanes-Oxley, the Commission finessed the “more than minimal planning” provision of Section 805(a)(2)(A)(iii) by treating it as duplicative of the “or otherwise extensive” language in Section 805(a)(2)(A)(i). The amended obstruction guideline provides a two-offense level increase if:

the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation . . . .<sup>199</sup>

While this addition to the obstruction guideline avoids the troublesome phrase “more than minimal planning,” it will surely reproduce in obstruction cases the same problem that “more than minimal planning” used to cause in fraud and theft. Any obstruction of justice case worth bringing, if it involves documents or objects, will almost inevitably involve the destruction, alteration, or fabrication of either (a) a lot of documents or objects, or (b) a few really important documents or objects. Consequently, the new enhancement, like its “more than minimal planning” predecessor, will be at least arguably applicable to virtually every documentary obstruction case, will in fact be applied in the vast majority of documentary

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<sup>196</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(4)(A), 2F1.1(b)(2)(A) (2000).

<sup>197</sup> See Goodwin, *The Case*, *supra* note 85 at 8.

<sup>198</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(8)(C) (2001). “Sophisticated means is defined as ‘especially intricate offense conduct pertaining to the execution or concealment of an offense.’” *Id.* at § 2B1.1 cmt. n.6(B).

<sup>199</sup> U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b)(3) (2003).

obstruction cases, and will in consequence generate litigation but serve no meaningful function in distinguishing between more and less serious documentary obstruction offenders.

The second point that emerges from close reading of Sections 805, 905, and 1104 is that, in the rush to legislate, no one took the time to harmonize these sections. One indicator of this haste is the number of overlapping and largely duplicative provisions of the three criminal titles. Consider the following language from Sections 805 and 1104:

Section 805(a)(2)(A) (Leahy)	Section 1104(a), (b) (Sensenbrenner)
<p>[T]he United States Sentencing Commission shall review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that—</p> <p>(1) the base offense level and existing enhancements contained in United States Sentencing Guideline 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity;</p> <p>(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—(A) the destruction, alteration or fabrication of evidence involves—(i) a large amount of evidence, a large number of participants, or is otherwise extensive; (ii) the selection of evidence that is particularly probative or essential to the investigation; or (iii) more than minimal planning . . . .<sup>200</sup></p>	<p>(a) [T]he United States Sentencing Commission is requested to—</p> <p>(1) promptly review the sentencing guidelines applicable to securities fraud and accounting fraud and related offenses . . . .</p> <p>(b) In carrying out this section, the Sentencing Commission is requested to—</p> <p>(4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated . . . .<sup>201</sup></p>

Mere duplication of reasonably clear directives, though indicative of legislative haste, is harmless in itself. Parallel provisions in the same bill which are both vague and susceptible of differing interpretations are more troublesome. The general directives in Sections 905 (Biden-Hatch) and 1104 (Sensenbrenner), set side-by-side below, suffer from this defect.

<sup>200</sup> Sarbanes-Oxley § 805(a)(2)(A).

<sup>201</sup> *Id.* § 1104(a), (b).

Section 905 (Biden-Hatch)	Section 1104 (Sensenbrenner)
<p>(a) [T]he United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act.</p> <p>(b) In carrying out this section, the Sentencing Commission shall—</p> <p>(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;</p> <p>(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violation of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act . . . .<sup>202</sup></p>	<p>(a) [T]he United Sentencing Commission is requested to—</p> <p>(1) promptly review the sentencing guidelines applicable to securities fraud and accounting fraud and related offenses . . . .</p> <p>(b) <i>In carrying out this section, the Sentencing Commission is requested to—</i>(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement to prevent such offenses.<sup>203</sup></p>

Both sections ask the Sentencing Commission to review sentencing levels for some types of economic crime. However, a careful reading of the two sections reveals that this is the only point on which they entirely agree. Section 1104 “request[s]” that the Commission “review” the guidelines “applicable to *securities and accounting fraud* and related offenses” and that it “ensure” that the guidelines “reflect the serious nature of *securities, pension, and accounting fraud*.”<sup>204</sup> In short, Section 1104 focuses narrowly on the types of corporate conduct which led to the collapse of Enron and which created the impetus for the Sarbanes-Oxley legislation.

By contrast, the language in Section 905 defining its intended scope is at once more ambiguous and, at least potentially, more expansive. Section 905 requires

<sup>202</sup> *Id.* § 905(a)–(b).

<sup>203</sup> *Id.* § 1104(b).

<sup>204</sup> *Id.* § 1104(a), (b) (emphasis added).

that the Sentencing Commission “ensure that the [Guidelines] reflect the *serious nature of the offenses and the penalties set forth in this Act*, the growing incidence of *serious fraud offenses which are identified above*, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish *such offenses*.”<sup>205</sup> At what offenses are these admonitions directed? Does the repeated reference to “serious” offenses imply a limitation akin to that in Section 1104 to the sorts of serious corporate misconduct upon which all debate about Sarbanes-Oxley focused? Or, given that Sections 902 and 903 raise maximum penalties for virtually all federal fraud crimes, does the phrase “serious fraud offenses which are identified above” suggest that the Sentencing Commission should raise guideline sentences for every defendant convicted under these statutes, regardless of the gravity of the particular offense and regardless of whether it related to large-scale corporate crime?

Sections 905 and 1104 differ not only in their potential scope, but also in the strength of their language. Section 1104 pretty clearly insists that the Commission pass some new enhancement where the number of fraud victims exceeds fifty<sup>206</sup> and in obstruction of justice cases involving document destruction.<sup>207</sup> But the general directives of Section 1104 do not insist that the Commission take any other particular step and in tone are generally respectful of the Commission’s judgment and prerogatives. Section 905 has a very different flavor, declaring that “the Sentencing Commission shall . . . ensure that the [Guidelines] reflect the serious nature of the offenses and the penalties set forth in this act . . . and *the need to modify the sentencing guidelines and policy statements* to deter, prevent, and punish such offenses.”<sup>208</sup> Even more pointed is the passage that insists the Commission “consider the extent to which the [Guidelines] are adequate *in view of the statutory increases in penalties in this Act*.”<sup>209</sup>

In short, Section 1104 continued to reflect the original reticence of the House to impose meaningful new criminal penalties for economic offenses, while Section 905, and to a lesser extent Section 805, embodied the Senate’s more aggressive and punitive approach. The difficulty for those charged with interpreting the Act was that Congress as a whole never chose between the two general approaches or tried to harmonize their particular provisions. Instead, it punted, put both general approaches and everybody’s pet particulars into the bill, and left the Sentencing Commission to figure it all out.

Ordinarily, an agency faced with interpreting imprecise statutory language could at least look to committee reports for guidance on congressional intent. However, of the three criminal titles in Sarbanes-Oxley, only Title VIII embodying Senator Leahy’s S. 2010 ever went through ordinary committee processes or was

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<sup>205</sup> *Id.* § 905(b)(1) (emphasis added).

<sup>206</sup> *Id.* § 1104(b)(5).

<sup>207</sup> *Id.* § 1104(b)(4).

<sup>208</sup> *Id.* § 905(b)(1) (emphasis added).

<sup>209</sup> *Id.* § 905(b)(2) (emphasis added).

the subject of a committee report.<sup>210</sup> Title IX, the Biden-Hatch contribution, entered the Act as a Senate floor amendment.<sup>211</sup> And as noted above, the Sensenbrenner bill which became Title XI flew from introduction in committee to passage by the full House in 48 hours.<sup>212</sup> Hence, the Commission was left to its own interpretive devices.

Thus, the third point about the guidelines directives in Sarbanes-Oxley is simply that their imprecision and inconsistency created an immense practical headache for the Sentencing Commission. The specific directives, whatever one may have thought about their wisdom, were at least relatively simple to convert into new guidelines language. The general directives were far more problematic. The Commission was left to wonder whether Congress really wanted any guideline sentence increases beyond the few specific ones spelled out in the Act, and if so whether such increases should be large or small, targeted at large-scale characteristically corporate crime or applicable to all federal economic offenses. Indeed, the different choices of phrase in the precatory passages of Sections 805, 905, and 1104 raised the fundamental questions of whether Congress wanted the Commission to exercise its independent, expert judgment in incorporating Sarbanes-Oxley into existing sentencing law, and of whether, and if so to what degree, Congress was prepared to defer to the Commission's judgment.

#### IV. THE SARBANES-OXLEY ACT AND THE U.S. SENTENCING GUIDELINES

##### *A. Debate in the U.S. Sentencing Commission: July 2002–January 2003*

Congress not only acted in haste itself, but commanded that the U.S. Sentencing Commission do so as well. All three criminal titles of the Sarbanes-Oxley Act insisted that the Commission promulgate guidelines responsive to the Act within 180 days following its enactment.<sup>213</sup> The Commission began work immediately. And immediately a fierce debate broke out over what course the Commission should take.

On one side were virtually all of the institutional and individual participants in the process that produced the Economic Crime Package of 2001. This group felt that the Commission had very largely accomplished in 2001 what Congress said it wanted in 2002—recalibrate sentences to impose harsher penalties on serious economic offenders. Moreover, this group drew two conclusions from the Sarbanes-Oxley Act's murky directives. On one hand, Congress plainly wanted some additional changes to the guidelines, as indicated by its specific directives and the 180-day deadline. On the other hand, the most sensible reading of the Act

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<sup>210</sup> The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. No. 107-146 (2002).

<sup>211</sup> See *supra* note 175.

<sup>212</sup> See *supra* notes 176–78, and accompanying text.

<sup>213</sup> Sarbanes-Oxley §§ 805(b), 905(c), and 1104(c).

as a whole was that Congress was focused on high-end, big-dollar corporate scandals and that any new guidelines amendments should narrowly target cases of that type.<sup>214</sup>

On the other side of the debate was the Department of Justice. In June 2002, the Department had pronounced itself happy with the 2001 Economic Crime Package, saving only its sentences for low-loss offenders. In October 2002, the Department discovered in Sarbanes-Oxley a mandate to the Commission to increase sentences both on corporate bigwigs and on ordinary middle and low level fraud and theft defendants.<sup>215</sup> Accordingly, DOJ proposed both specific enhancements for characteristically corporate crime and a loss table amendment significantly increasing penalties for any defendant sentenced under Section 2B1.1 who caused a loss over \$10,000.<sup>216</sup>

I cannot pretend to complete scholarly neutrality in weighing the merits of the two competing views, as I was actively engaged in the debate on the side of a restrained interpretation of Sarbanes-Oxley's sentencing directives. My opinion at the time is fairly summarized in the following excerpt from a December 2002 letter to the Sentencing Commission:

I have studied the text of the Act with some care. In my view, across-the-board [economic crime sentence] increases are not required by the language of the Act and, in any event, would not be consistent with what I perceive to have been the intent of Congress. Moreover, and of perhaps greatest importance, the Act is a directive to the Commission to use its expertise and judgment in fulfilling congressional objectives—objectives expressed in this legislation and more broadly in the Sentencing Reform Act. In my personal view, the Commission would not be employing its expertise or exercising its judgment wisely if it were to respond to the Act with sentence increases applicable to all types and degrees of economic crime.

First, the Act does not direct across-the-board sentence increases for all economic crimes. Nor does the language of the Act necessarily imply such a directive. [Detailed discussion of statutory language omitted.]

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<sup>214</sup> For examples of this position, see Letter of Practitioners' Advisory Group to Sentencing Commission (Dec. 12, 2002) in 15 FED. SENTENCING REP. 275 (2003); Letter from Frank O. Bowman, III, to Hon. Diana Murphy, Chair, U.S. Sentencing Commission (Dec. 13, 2002) (on file with author).

<sup>215</sup> See Letter of Department of Justice to U.S. Sentencing Commission Regarding Post-Sarbanes-Oxley Guidelines Amendments, 15 FED. SENTENCING REP. 270 (2003) [hereinafter *DOJ October Letter*].

<sup>216</sup> *Id.* at 272.



Second, a review of the legislative history of the Sarbanes-Oxley Act does not support the view that Congress intended across-the-board sentence increases for all economic crimes, or even for all frauds. The impetus for the Act and the several pieces of precursor legislation in the House and Senate was a wave of scandals in very large corporations such as Enron and WorldCom. Speaking broadly, these scandals shared certain features: All involved apparent fraud or mismanagement by very senior managers at very large corporations resulting in bankruptcies and/or significant stock losses to shareholders and employee pension funds. In several cases, there were allegations of conflict of interest, accounting errors, destruction of documents, or even outright collusion in fraud by outside auditors. In virtually all of the cases alluded to in congressional testimony or remarks by legislators, the losses alleged to flow from the asserted misconduct were in the millions, and usually tens to hundreds of millions, of dollars.

During the debates over the Act, in addition to expressing their concern about the losses suffered by individual investors and employees, legislators repeatedly opined that their basic objective in passing this bill was to root out corporate wrongdoing and questionable accounting practices in order to restore confidence in American capital markets.<sup>217</sup> In short the evil Congress thought it was addressing was systemic fraud, mismanagement, and phony accounting by executives, accountants, and board members of large publicly traded corporations—offenses on a scale that threatened the financial soundness of these huge corporations and therefore the health of the entire U.S. economy.<sup>218</sup>

I continue to think this is the better view of Sarbanes-Oxley; however, the Justice Department's position was not wholly without statutory support. In its correspondence with the Sentencing Commission seeking blanket sentence increases,<sup>219</sup> the Department relied on the language of Section 905 discussed above.<sup>220</sup> In addition, the Department invoked statements by Senators Leahy and

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<sup>217</sup> See, e.g., 148 CONG. REC. S7350–65 (2002) (debate on Senate floor at the time of the introduction of the conference report on the Act, July 25, 2002).

<sup>218</sup> See DOJ October Letter, *supra* note 215; U.S. Justice Department Statement on Guidelines Amendments Responsive to Sarbanes-Oxley Act, 15 FED. SENTENCING REP. 278 (2003) [hereinafter DOJ December Statement].

<sup>219</sup> See DOJ December Statement, *supra* note 218.

<sup>220</sup> See *supra* notes 212–19, and accompanying text.

Biden.<sup>221</sup> Read in context, the quotations from Senator Leahy do not support the Department's position.<sup>222</sup> However, one comment by Senator Biden is at least

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<sup>221</sup> DOJ December Statement, *supra* note 218.

<sup>222</sup> In the DOJ December Statement the Justice Department cites two statements by Senator Patrick Leahy as supportive of its broad reading of the Sarbanes-Oxley Act. See DOJ December Statement, *supra* note 218, at 279. As indicated in the following excerpt of my January 4, 2003 letter to the Commission, the Leahy quotes did not support the Department's position:

In its December 18, 2002 letter, the Justice Department proffers three bits of evidence in support of the notion that Congress intended the criminal provisions of Sarbanes-Oxley to effect a general increase in economic crime sentences—quotations from Senators Leahy and Biden and an allusion to the Senate Report accompanying S. 2010, a predecessor to Sarbanes-Oxley introduced by Senator Leahy and others in May 2002. Individually or together, these three items are thin gruel.

As for the Senate Report, . . . read as a whole it illustrates that Senator Leahy's original bill was directed at high-level corporate malfeasance and not at every garden-variety theft or fraud crime. Virtually the entire report is devoted to a recounting of the Enron scandal, and virtually every one of S. 2010's provisions is aimed at some aspect of the Enron affair. At no point does the report allude to economic crime generally or express a desire that the Sentencing Commission should increase economic crime sentences generally. To the extent the report refers to the Sentencing Guidelines at all, it suggests that "federal sentences sufficiently neither punish *serious frauds* and obstruction of justice nor take into account all aggravating factors that should be considered *in order to enhance sentences for the most serious fraud and obstruction of justice cases*." (Emphasis added.)

The selective quotations from Senators Leahy and Biden are equally unpersuasive. When I first read these quotes in the Department's letter, I was sufficiently arrested by their apparent import that I looked them up in the Congressional Record. Read in their entirety, the passages from which the Department draws these quotes are either ambiguous or, in the case of Senator Leahy, actually prove the reverse of the Department's contention and demonstrate he, in common with his fellow legislators, interpreted the Act as directed at serious corporate fraud.

The single sentence quoted from Senator Leahy is drawn from his section-by-section analysis of Title VIII of the Act. Title VIII is derived from Senator Leahy's S. 2010 and is transparently directed at the particular types of corporate misconduct alleged in the collapse of Enron. Sections 801–07 address obstruction of justice, failure to preserve audit records, bankruptcy rules regarding the dischargeability of debts arising in the course of securities law violations, extension of statutes of limitation for private securities law cases, whistleblower protections for employees of publicly traded companies, criminal penalties for securities fraud, and provide a directive to the Commission to consider enhancement of criminal penalties for obstruction of justice and "serious fraud cases." It is this last provision (Section 805 of the Act) Senator Leahy is addressing in the sentence quoted by the Department. The entire passage reads as follows:

Section 805 of the Act ensures that those who destroy evidence or perpetrate fraud are appropriately punished. It would require the Commission to consider enhancing

susceptible of the construction the Department placed on it. In a floor statement on July 26, 2002, Senator Biden said:

Our bill also directed the U.S. Sentencing Commission to review our existing federal sentencing guidelines. As you know, the sentencing guidelines carefully track the statutory maximum penalties that Congress sets for specific criminal offenses. Our bill requires the sentencing commission to go back and recalibrate the sentencing guidelines to raise penalties for the white-collar offenses affected by this legislation.<sup>223</sup>

Even here, however, Senator Biden talked about raising penalties for “the white collar offenses affected by this legislation”—hardly an unambiguous endorsement of across-the-board sentence increases for economic offenders large and small.

#### B. *The January 2003 Emergency Sentencing Guidelines Amendments*

Whatever the merits of the competing views of congressional intent, in drafting the round of “emergency” amendments due 180 days after passage of the Act, the Sentencing Commission adopted a minimalist view. On January 8, 2003, the Commission promulgated a set of amendments effective January 25, 2003 which: (a) added two new positions at the top of the Section 2B1.1 loss table for offenses involving losses of more than \$200 million and more than \$400 million; (b) added an additional two-level enhancement for offenses involving 250 or more victims; (c) added an enhancement for conduct that substantially endangered the

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*criminal penalties in cases involving obstruction of justice and serious fraud cases where a large number of victims are injured or when the victims face financial ruin.*

The Act is not intended as criticism of the current guidelines, which were based on the hard work of the Commission to conform with the goals of prior existing law. Rather, it is intended to join the provisions of the Act which substantially raise current statutory maximums in the law as a policy expression that the former penalties were insufficient to deter financial misconduct and to request the Commission to review and enhance its penalties as appropriate in that light.

If any question remained about Senator Leahy’s meaning, it is removed two paragraphs later where, still speaking about Section 805, he states, “This provision and Title 11, also require that the Commission consider enhancing the *penalties in fraud cases which are particularly extensive or serious*, even in addition to the recent amendments to the Chapter 2 guidelines for fraud cases.” *Id.* (emphasis added.). In short, Senator Leahy’s position is exactly the opposite of the one the Department attributes to him. Letter from Frank O. Bowman, III, to U.S. Sentencing Commission, (Jan. 4, 2003) (on file with author).

<sup>223</sup> DOJ December Statement, *supra* note 218, at 279 (quoting 148 CONG. REC. S7426 (2002)).

solvency or financial security of certain large organizations or of 100 or more individual victims; and (d) added a new four-level enhancement for defendants who were officers or directors of publicly traded companies.<sup>224</sup>

Nonetheless, the Commission was acutely aware of the fact that the Department of Justice was unsatisfied with the narrow focus of the emergency amendments. In addition to filing formal written comments seeking broadly higher economic crime sentences,<sup>225</sup> the Department's representatives were privately expressing displeasure to the Commission, saying in plain terms that the Department would go back to Congress for further legislation if the Commission did not accede to its demand for higher sentences.<sup>226</sup> Accordingly, the Commission left the door open for further, more broad-based, sentence increases. On January 17, 2003, it invited comment on whether it should enact further amendments, in particular increases in the base offense level for 2B1.1 and a modification of the loss table for offenders at all levels.<sup>227</sup>

### C. The May 2003 Sentencing Guidelines Amendments

January through April of 2003 was devoted to debating whether the Commission should adopt an across-the-board increase in economic crime sentences. This section of the Article will analyze the positions of the parties to the debate, with particular attention to the position of the Department of Justice.

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<sup>224</sup> United States Sentencing Commission, *Emergency Guidelines Amendments*, 15 FED. SENTENCING REP. 281, 281 (2003).

<sup>225</sup> See, e.g., *DOJ December Statement*, *supra* note 218, at 278 (advocating significant upward revision of the entire loss table and saying of the amendments adopted three weeks later that they "would result in little or no change in the actual sentences imposed on those who commit corporate and other types of fraud" and would therefore "send the entirely wrong signal").

<sup>226</sup> I am aware of the Justice Department's oral representations to the Commission as a result of conversations with Sentencing Commissioners, Commission staff, and Department of Justice officials.

<sup>227</sup> Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 68 Fed. Reg. 2615 (Jan. 17, 2003):

The [January 8, 2003 emergency] amendment provided two additional levels to the table; an increase of twenty-eight levels for offenses in which the loss exceeded \$200,000,000 and an increase of thirty levels for offenses in which the loss exceeded \$400,000,000. The Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, the loss table should be modified more extensively to provide increased offenses levels for offenses involving lower loss amounts . . . . Additionally, the Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should amend § 2B1.1(a) to provide an alternative base offense level, either in conjunction with, or in lieu of, an amendment to the loss table, that would apply based on the statutory maximum term of imprisonment applicable to the offense of conviction.

### 1. The Department of Justice

In its October 2002 letter to the Sentencing Commission, the Department of Justice sought an increase in the base offense level of all economic crimes sentenced under U.S.S.G. § 2B1.1 from 6 to 7, and a complete revision of the loss table of § 2B1.1.<sup>228</sup> In combination, these alterations would have increased sentences for all defendants who caused losses greater than \$10,000. In form, the Department's proposal was an across-the-board sentence increase. Examined carefully, it had two different components.

First, by raising the base offense level and changing the low end of the loss table, the Department sought to increase the number of defendants *required* to serve prison time. The Guidelines Sentencing Table is divided into Zones A, B, C, and D.<sup>229</sup> Defendants with sufficiently low offense levels and criminal history categories who fall into Zones A and B are eligible for sentences of probation and community confinement.<sup>230</sup> Defendants in Zone C are eligible for split sentences of imprisonment and various prison alternatives.<sup>231</sup> Only defendants in Zone D must be sentenced to a purely prison sentence.<sup>232</sup> Raising the base offense level for all sentences under § 2B1.1 and lowering the loss amounts at the low end of the loss table reduces the number of defendants eligible for Zone A, B, and C sentences. The Department's objective was to restrict the discretion of judges to impose non-prison sentences, split sentences, and other alternative punishments. In shorthand, this component of the Department of Justice proposal was directed at the "in-out decision."

The second component of the Department of Justice proposal was a modification of the loss table to increase the length of prison sentences for all economic crime defendants who would already be serving prison sentences under current guidelines.

The low-end portion of the Department of Justice position had two points to commend it. The first was consistency. That is, throughout the long economic crime package debate, the Department under both Presidents Clinton and Bush urged lower trigger points for incarceration. And in its Senate testimony during the summer of 2002, the Department expressed its "concern" about sentences for losses less than \$70,000.<sup>233</sup>

Second, this component of the Department of Justice position was supported by a logical argument. In essence, the Department argued that serious offenses should result in some period of incarceration, and in their view the loss table

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<sup>228</sup> See *DOJ October Letter*, *supra* note 215, at 272.

<sup>229</sup> U.S. SENTENCING GUIDELINES MANUAL § 5A1.1 (2003).

<sup>230</sup> *Id.* § 5B1.1.

<sup>231</sup> *Id.* § 5C1.1.

<sup>232</sup> *Id.*

<sup>233</sup> See *Getting Tough Hearing*, *supra* note 122.

enacted in the 2001 Economic Crime Package let serious offenders—those who steal sums in the range of \$50,000–\$100,000—escape incarceration.<sup>234</sup> In isolation, this argument had some force. Stealing \$70,000 is a serious matter, and one can argue perfectly reasonably that one who does so should go to prison. Even so, the Department's position suffered from dual defects:

(a) Even if one conceded that defendants who steal \$50,000–\$100,000 should be required to go to prison, the Department's proposal required at least some prison time for every defendant who caused a loss greater than \$20,000, and precluded the possibility of straight probation for any defendant causing loss greater than \$10,000.<sup>235</sup>

(b) Regardless of the substantive merits of the Department of Justice position, it had made exactly the same argument for five years during the long process of developing the 2001 Economic Crime Package, but the Commission after careful study and consultation with all the other interested institutions—judges, probation officers, the defense bar—arrived at a loss table with different trigger points than the Department of Justice would have preferred.

Between the enactment of the Economic Crime Package in 2001 and the Commission's consideration of Sarbanes-Oxley in spring 2003, only one thing had changed—passage of a bill aimed at serious, large-scale corporate fraud.<sup>236</sup> By linking its recycled arguments for lower in-out trigger points to an across-the-board sentence increase, the Department of Justice hoped to harness congressional concern about serious corporate crime to compel passage of guidelines provisions that had at best a strained connection to the language and purposes of the Sarbanes-Oxley Act.

The Department's argument for raising sentences on moderate-to-serious offenders already receiving prison terms under existing guidelines was weak

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<sup>234</sup> See U.S. Sentencing Commission, *Hearing on Amendments in Response to Sarbanes-Oxley*, 15 FED. SENTENCING REP. 291, 291–92 (2003) [hereinafter *Hearing on Sarbanes-Oxley Amendments*] (statement of testimony of William Mercer, United States Attorney for the District of Montana and Chair of the Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee).

<sup>235</sup> Under the Department's proposal in its October 2002 letter to the Commission, a fraud or theft defendant who caused a loss of \$10,001 would have a base offense level of 7 and a loss enhancement of four levels. *DOJ October Letter*, *supra* note 215, at 272. Assuming a guilty plea and a two-level reduction for acceptance of responsibility under § 3E1.1, the final offense level of 9 would produce a Zone B sentence requiring at least intermittent confinement, community confinement, or home detention. U.S. SENTENCING GUIDELINES MANUAL § 5B1.1(a)(2) (2003). A fraud or theft defendant who caused a loss of \$20,001 would have a base offense level of 7 and a loss enhancement of six levels. *DOJ October Letter*, *supra* note 215, at 272. Assuming a guilty plea and a two-level reduction for acceptance of responsibility under § 3E1.1, the final offense level of 11 would produce a Zone C sentence requiring at least a split term of imprisonment and either intermittent confinement, community confinement, or home detention. U.S. SENTENCING GUIDELINES MANUAL § 5C1.1(c) (2003).

<sup>236</sup> From a purely political perspective, one other important thing had changed. Following the November 2002 elections, the Senate passed from Democratic to Republican control, and thus the Ashcroft Justice Department could anticipate a congenial response to its proposals from both sides of Capitol Hill.

precisely where its low-loss, in-out argument was strong. First, the Department's insistence on additional, across-the-board sentence increases was inconsistent with its own position only months before. Before the passage of the Sarbanes-Oxley Act, the Department did not argue that economic crime sentences in general were too low. As noted above, in June 2002, before the Senate Judiciary Committee, the Department specifically endorsed the Economic Crime Package as a substantial achievement.<sup>237</sup> After Sarbanes-Oxley, the Department's position on the adequacy of mid- to high-loss economic crime sentences reversed 180 degrees.

Second, and far more critically, the Justice Department never attempted to explain *why* higher sentences for those already receiving prison sentences were necessary or even desirable.<sup>238</sup> It is difficult to avoid the conclusion that the Department declined to debate the merits of mid-to-high-loss sentence increases because its substantive case for doing so was not very compelling. This supposition is supported by consideration of the facts regarding economic crime and federal white collar sentencing as matters stood immediately following the passage of the January 2003 emergency amendments.

## 2. The State of Economic Crime & Federal White-Collar Sentencing: January 2003

A general increase in federal economic crime sentences might have been justifiable on deterrence grounds if there were evidence that existing penalties were failing to deter potential offenders. One indicator of insufficiently stringent penalties for a class of crimes would be an increase in the general incidence of such crimes. However, the available statistics show exactly the opposite trend for economic offenses.

Figures published by the Justice Department's Bureau of Justice Statistics show that the rate of property crime dropped steadily between 1974 and 2001. The victimization rate for property crimes fell from 551 incidents per 1000 households in 1974 to 167 per 1000 households in 2001, a decline of 69%.<sup>239</sup> This long-term trend continued throughout the 1990s. The percentage of households experiencing a property crime of property theft, motor vehicle theft, or household burglary

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<sup>237</sup> See *Getting Tough Hearing*, *supra* note 122, at 236.

<sup>238</sup> At no point between August 2002 and the passage of the final post-Sarbanes-Oxley Guidelines amendments in April 2003 did the Department of Justice ever offer either a written or oral explanation of the purported need to further increase sentences for mid-to-high loss economic offenses. For example, the March 25, 2003 testimony of the Department's representative, U.S. Attorney William Mercer, before the U.S. Sentencing Commission contains a cogent argument for requiring more medium-to-low-loss defendants to serve some time, but it is utterly silent on the question of why, as a matter of sound sentencing policy, *every* sentence of *every* defendant who caused a loss from \$10,001 to \$10 billion should increase. See *Hearing on Sarbanes-Oxley Amendments*, *supra* note 234, at 291-92.

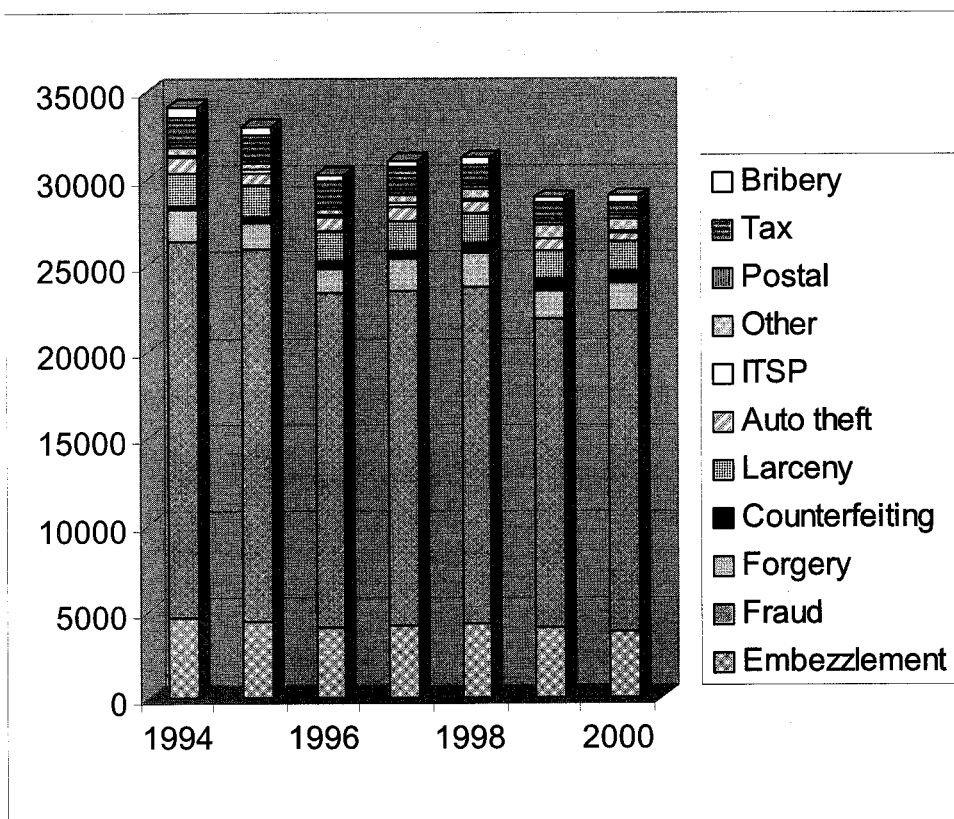
<sup>239</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Property Crime Rates*, at <http://www.ojp.usdoj.gov/bjs/glance/house2.htm> (last modified Aug. 24, 2003).

declined from about 21% in 1994 to about 14% in 2000.<sup>240</sup> Of course, these national statistics are primarily for offenses prosecuted at the local level. Nonetheless, there are strong indications that the national downward trend in property crime was mirrored in economic crimes prosecuted in federal court. As Figure 1 below illustrates, in recent years referrals by federal investigative agencies to U.S. Attorney's Offices for economic offenses have declined steadily, dropping by 5166 or 15% between 1994 and 2000.

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<sup>240</sup> See Patsy A. Klaus, *BJS Bulletin: Crime and the Nation's Households, 2000*, NCJ 194107 (Sept. 13, 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cnh00.pdf>.



**Figure 1. Referrals to U.S. Attorney's Offices, 1994–2000<sup>241</sup>**

This decline is rendered even more striking when one considers that between 1994 and 2000, the U.S. population grew by approximately 20 million people.<sup>242</sup> Thus, while the absolute number of economic crime referrals to U.S. Attorney's Offices fell by 15% during 1994–2000, in the same period the rate of economic crime referrals to federal agencies per 1000 population fell by 21%.

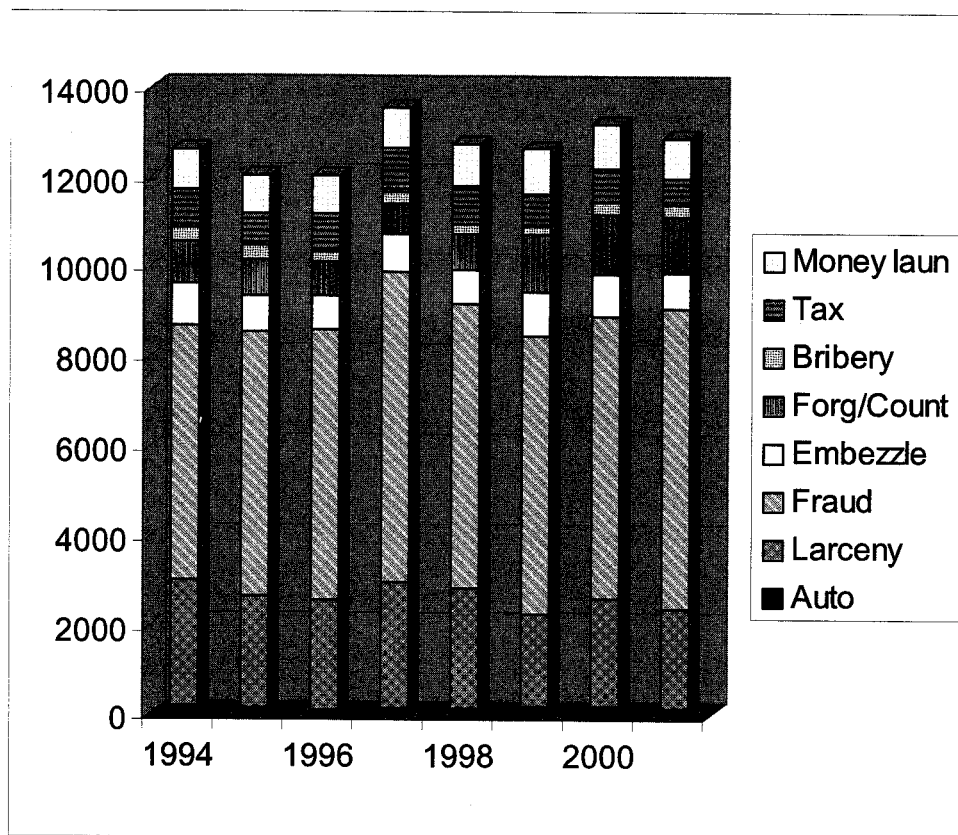
Interestingly, as shown in Figure 2 below, while federal economic crime referrals dropped from 1994–2000, the number of economic crime defendants sentenced in federal court held roughly steady between 1994 and 2001. The

<sup>241</sup> The data in Figure 1 is drawn from the 1994–2000 editions of the BJS. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Compendium of Federal Criminal Justice Statistics*, at <http://www.ojp.us.doj.gov/bjs/fed.htm#findings> (last modified Nov. 25, 2003).

<sup>242</sup> U.S. Census Bureau, *2001 Statistical Abstract of the United States*, sec. 1, tbls. 1, 2, at 8, available at <http://www.census.gov/prod/www/statistical-abstract-02.html> (last modified Feb. 12, 2003) (showing that the population of the United States grew from approximately 260,637,000 in 1994 to 281,421,906 in 2000).

number of defendants sentenced for economic crimes peaked in 1997 at 13,571, but was virtually identical in 1994 (12,631) and 2001 (12,887).

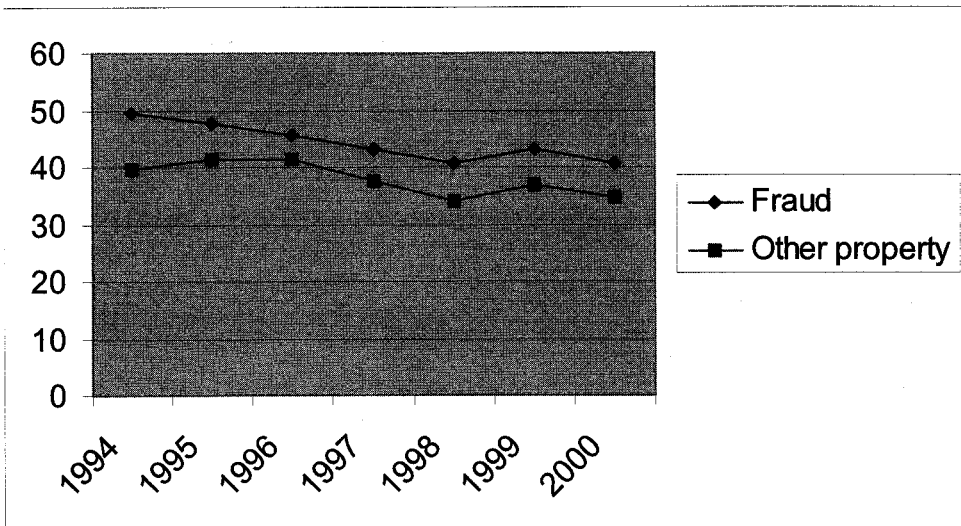
**Figure 2. Defendants Sentenced In Federal Court – Economic Crime, 1994–2001**<sup>243</sup>



As one would expect, maintaining a roughly constant number of economic crime defendants from a decreasing supply of economic crime referrals has meant U.S. Attorney's Offices must decline fewer economic crime cases. Figure 3 illustrates the decreasing federal declination rates for fraud and other property offenses between 1994 and 2000.

<sup>243</sup> For data in Figure 2, see U.S. SENTENCING COMMISSION, 1994 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 1995; *id.* 1996; *id.* 1997; *id.* 1998; *id.* 1999; *id.* 2000; *id.* 2001. Crime categories in figures 1 and 2 are different because BJS and the Sentencing Commission code data differently. Nonetheless, the offenses covered by the two graphs are roughly congruent.

**Figure 3. Declination Rates: Fraud & Other Property Crime, 1994–2000 (%)**<sup>244</sup>



In sum, the available evidence suggests that, far from confronting a rising tide of economic crime, the Department of Justice had been obliged to dip ever deeper into a shrinking pool of offenders to hold roughly constant the flow of economic crime defendants through the federal courts.

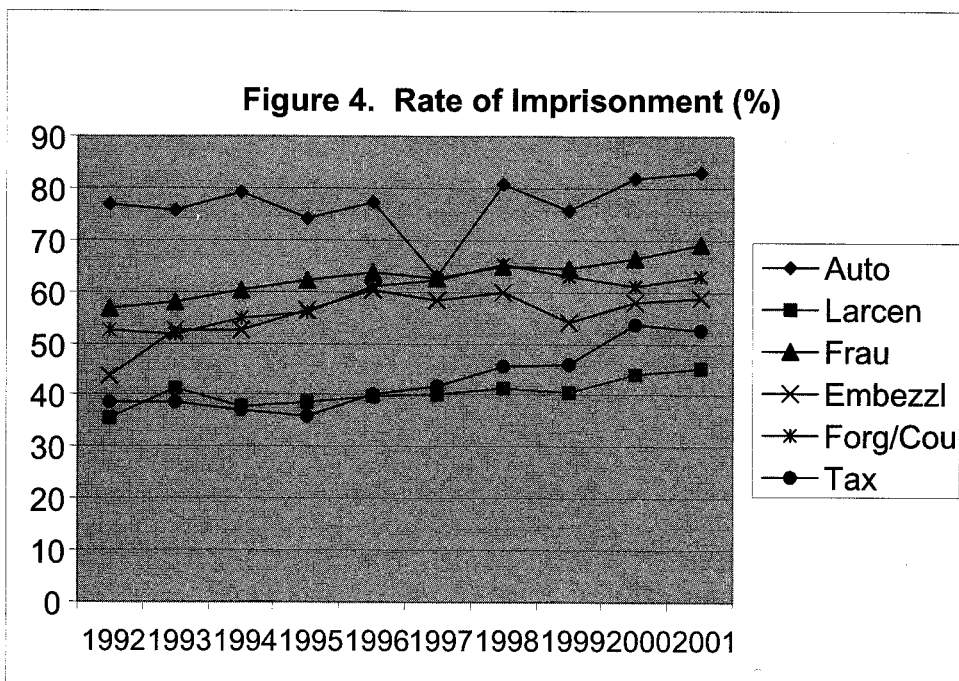
Even absent a growing economic crime wave, one might press for federal sentence increases if there were evidence that the actors in the federal system were growing soft, progressively lowering the sentences actually imposed on economic crime defendants. Average sentences imposed by federal judges in a number of major crime categories did decline during the 1990s. For example, the average (mean) length of sentences imposed on drug defendants decreased from 87.6 months to 71.7 months between 1994 and 2001, while the average length of sentences for violent offenders declined from 101.6 months to 89.5 months.<sup>245</sup> If a similar trend existed in economic crime sentencing, the Justice Department's position might have been justified as an effort to reverse it. However, Sentencing Commission statistics establish that during the same period in which drug and

<sup>244</sup> See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Compendium of Federal Criminal Justice Statistics*, available at <http://www.ojp.usdoj.gov/bjs/fed.htm#findings> (last modified Nov. 25, 2003) (BJS counts fraud, embezzlement, forgery, and counterfeiting as "fraud," and burglary, larceny, auto theft, arson, ITSP, and miscellaneous as "other.").

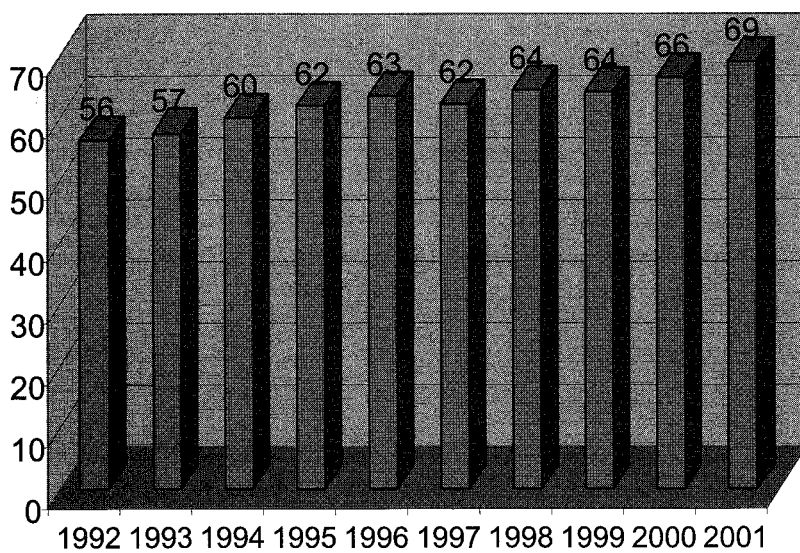
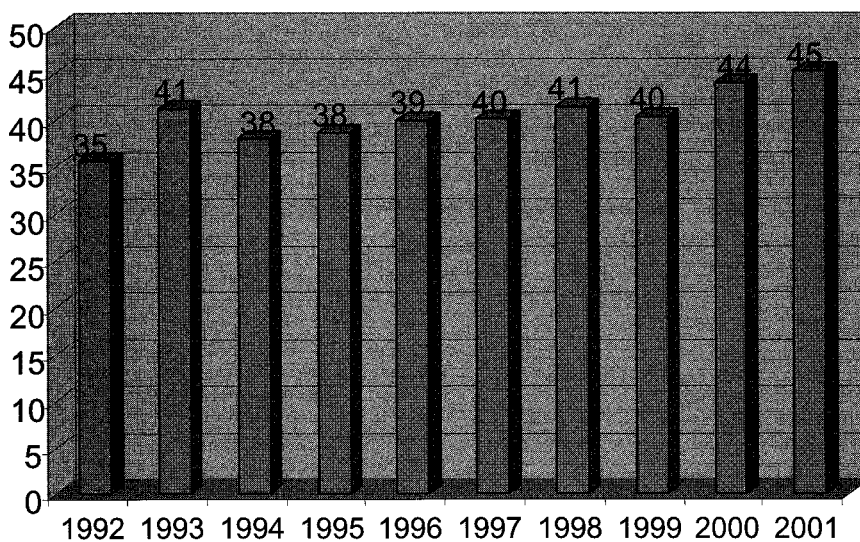
<sup>245</sup> U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2001, at 32 fig. E (2002); U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 1998, at 32 fig. E (1999). For an analysis of the causes of the decline in drug sentence length, see Bowman & Heise, *supra* note 73; Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001).

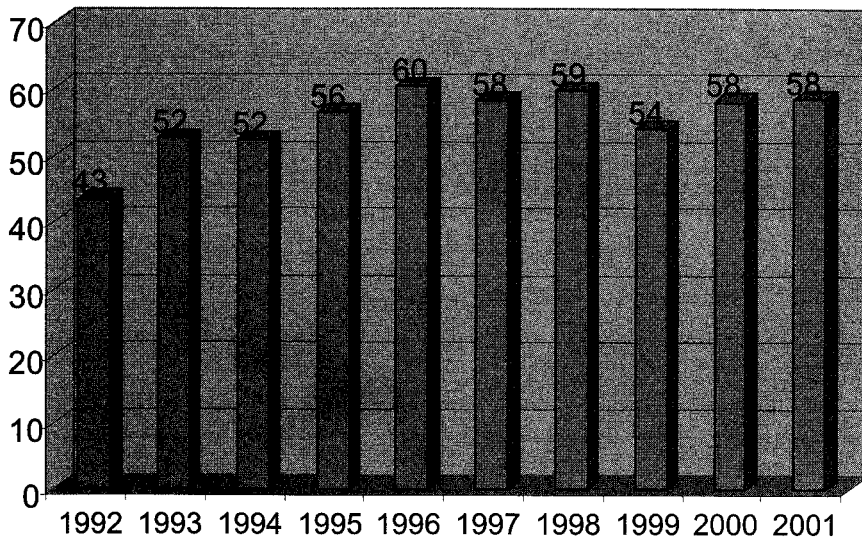
violent crime sentences were dropping, the average (mean) sentence of white collar defendants actually increased slightly, from 19 months in 1994 to 20.8 months in 2001. The median sentence increased still more, from 12 months in 1994 to 15 months in 2001.<sup>246</sup>

Moreover, these figures apply only to those defendants actually sentenced to a term of imprisonment. The percentage of economic crime defendants who receive terms of imprisonment increased markedly throughout the 1990s. Figure 4 below illustrates the upward movement in imprisonment rates for auto theft, larceny, fraud, embezzlement, forgery/counterfeiting, and tax offenders. Figures 4A, 4B, and 4C break out the numbers for the major categories of fraud, larceny, and embezzlement.



<sup>246</sup> U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 32 fig. E (2002); U.S. SENTENCING COMMISSION, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 32 fig. E (1999).

**Figure 4A. Imprisonment Rate - Fraud (%)****Figure 4B. Imprisonment Rate - Larceny (%)**

**Figure 4C. Imprisonment Rate - Embezzlement (%)**

In short, during the 1990s, an ever-increasing percentage of economic offenders were sentenced to prison and those who received prison sentences received higher average sentences. Still more importantly, because of the sentence increases built into the 2001 Economic Crime Package and the January 2003 post-Sarbanes-Oxley emergency amendments, the upward trend would certainly have continued after January 2003, even without the additional increases called for by the Justice Department.

To illustrate the cumulative effect of the economic crime guideline amendments between 1987 and January 2003, consider the following illustrative group of hypothetical defendants with varying loss amounts and offense characteristics. Figures 5A and 5B below describe these defendants and the sentences they would probably have been subject to in 1987, 1989, 1991, 1998, November 2001, and January 2003.

**Figure 5A. Description of Representative Defendants**

Def. A	Teller in federally insured bank. Steals \$2,000 from bank.
Def. B	Wife of social security recipient. Continues to cash checks after death of spouse. Loss = \$11,000
Def. C	Defendant is a postal worker who steals credit cards from the mail and uses them to purchase goods worth \$35,000, which he then sells to support a drug habit.
Def. D	Defendant commits online auction fraud from his home computer. Causes loss of \$50,000 to more than 50 victims.
Def. E	Doctor submits false billings to Medicare using complex system of double books. Loss = \$125,000
Def. F	Telemarketer runs boiler room with 8 employees. Defrauds more than 250 elderly victims of \$250,000.
Def. G	Computer expert constructs scheme for stealing credit card and other personal information online. Using this information, he obtains merchandise and phony car loans online totaling \$450,000 from 25 individual and institutional victims.
Def. H	President of small, publicly traded bank commits bank fraud causing loss of \$1.1 million and collapse of the bank. In the course of the offense, he causes false statements to be made in required SEC filings. Thirty employees lose their jobs.
Def. I	CEO of publicly traded corporation operating chain of hospitals and nursing homes, in collusion with 4 other members of his management team, defrauds Medicaid and Medicare of \$10.1 million and causes false statements to be made in required SEC filings.
Def. J	CEO of large conglomerate, in collusion with CFO and other members of management, engage in accounting fraud and stock manipulation causing bankruptcy of company and losses to shareholders and employee pension fund of \$110 million.

**Figure 5B. Applicable Guideline Range of Representative Defendants<sup>247</sup>**  
 (Calculation assumptions explained in endnotes on pages 441–42)

	1987	1989	1991	1998	Nov. 2001	Jan. 2003
Def. A	0-6 mos. <sup>1</sup>	0-6 mos. <sup>2</sup>	0-6 mos.	0-6 mos.	0-6 mos.	0-6 mos.
Def. B	2-8 mos. <sup>3</sup>	4-10 mos. <sup>4</sup>	4-10 mos.	4-10 mos.	6-12 mos.	6-12 mos.
Def. C	12-18 mos. <sup>6</sup>	15-21 mos. <sup>5</sup>	15-21 mos.	15-21 mos.	27-33 mos.	27-33 mos.
Def. D	10-16 mos. <sup>9</sup>	12-18 mos. <sup>10</sup>	12-18 mos.	12-18 mos.	27-33 mos.	27-33 mos.
Def. E	21-27 mos. <sup>12</sup>	24-30 mos. <sup>11</sup>	24-30 mos.	24-30 mos.	33-41 mos.	33-41 mos.
Def. F	37-46 mos. <sup>15</sup>	41-51 mos. <sup>16</sup>	41-51 mos.	51-61 mos.	78-97 mos.	78-97 mos.
Def. G	24-30 mos. <sup>20</sup>	30-37 mos. <sup>21</sup>	30-37 mos.	30-37 mos.	78-97 mos.	78-97 mos.
Def. H	27-33 mos. <sup>23</sup>	37-46 mos. <sup>24</sup>	57-71 mos. <sup>25</sup>	57-71 mos.	121-151 mos.	121-151 mos.
Def. I	57-71 mos. <sup>28</sup>	87-108 mos. <sup>29</sup>	87-108 mos.	87-108 mos.	121-151 mos.	121-151 mos.
Def. J	57-71 mos. <sup>32</sup>	121-151 mos. <sup>33</sup>	121-151 mos.	121-151 mos.	121-151 mos.	121-151 mos.

Figures 5A and 5B illustrate visually several points of central importance: First, Guideline sentences for economic crime were raised repeatedly between 1987 and January 2003. For some classes of offenders, the Commission increased sentences four times since 1987, and three times between 1998 and January 2003.

Second, the increases were very substantial, in both absolute and percentage terms. By January 2003, the Guideline sentence of all but one defendant in Figure 5B whose loss level exceeds \$10,000 had at least doubled since 1987 (and that Defendant E would receive a sentence 60% higher than in 1987). For the five most serious offenders, sentences rose between 160% and 330%. In absolute terms, from 1998 to January 2003, Guideline sentences for the same conduct rose by as little as four months (Defendant B) to as much as *fourteen additional years* (Defendant I). And in the case of Defendant J, whose circumstances mirror those of the leading figures in the 2001-2002 corporate scandals, the minimum guideline sentence skyrocketed from less than five years in 1987 to mandatory life imprisonment.

Third, the sentence increases shown in Figure 5B result in large measure from amendments adding or modifying Specific Offense Characteristics, as well as from the amendments to the loss table in 1989 and 2001. In 1987, the theft and fraud guidelines combined contained only nine sentence-enhancing Specific Offense

<sup>247</sup> Figure 5B assumes first-time offenders (Criminal History Category I), convicted after trial. Sentences for defendants pleading guilty would be slightly lower. Sentences for defendants with criminal records would be slightly (in some cases considerably) higher. Shaded boxes indicate a sentence increase due to guideline change.



Characteristics. By 2001, there were twenty-three. The January 2003 amendments added at least three more. Application of any one of these enhancements produces at least a 25% increase in a defendant's guideline sentence.<sup>248</sup> Where more than one enhancement applies, the cumulative effect begins to rival that of the loss amount. This is a critical point because the Justice Department proposals focused almost entirely on the loss table, as if no other factors affected a defendant's sentence. Particularly in serious economic crime cases of the sorts which receive wide public attention—telemarketing fraud, complex schemes involving offshore concealment, fraud against the elderly, identity theft, bank fraud, bankruptcy fraud, and now high-level corporate fraud—the Commission has added a plethora of sentence enhancements.

Fourth, Figure 5B does not capture an important component of the 2001 Economic Crime Package that will produce additional sentence increases beyond those immediately obvious from reading the Loss Table or Specific Offense Characteristics. The revised definition of loss, which focuses on pecuniary harms reasonably foreseeable to a defendant at the time of the offense, will, in a good many cases, produce a higher loss figure and thus a higher sentence than the old definition.<sup>249</sup>

Despite the upward trend of economic crime sentences, the Justice Department might have justified its position with the claim that economic crime sentences were still too low in comparison with sentences for other types of federal crime. A superficially plausible case for this view might be made by comparing the 2001 average white-collar sentence of just over 20 months with the average drug sentence (71.7 mos.) or violent crime sentence (89.5 mos.).<sup>250</sup>

However, any such comparison of averages would be inherently flawed. First, no serious observer would argue that crimes against property are as serious as violent crimes against persons.<sup>251</sup> More importantly, focusing on the relatively low average prison sentence for the entire class of federal economic criminals is profoundly misleading because the clear majority of federal economic crime defendants are low-level offenders whose crimes caused only modest losses. For example, in 1999, 55% of all federal defendants sentenced for economic crime

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<sup>248</sup> This is so because all SOC's carry at least a two-offense-level increase, and beginning at Offense Level 8, every two-level upward adjustment on the Sentencing Table carries at least a 25% increase in the minimum guideline sentence.

<sup>249</sup> The field test of the revised loss definition found that the new definition produced a higher loss amount in about 15% of randomly selected cases. U.S. Sentencing Commission, *A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission* (Oct. 20, 1998), available at <http://www.ussc.gov/publicat/Lossdefn.pdf> (last modified Oct. 20, 1998).

<sup>250</sup> U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 32 fig. E (2002).

<sup>251</sup> It would have been particularly surprising to hear the Bush Administration arguing that garden variety thefts and frauds are as serious as drug trafficking, an activity the Administration had publicly linked to terrorism and cited as a threat to national security.

offenses caused losses less than \$40,000. More than 30% were responsible for losses less than \$10,000. *And fully 15% of all federal economic defendants, or one out of seven, took less than \$2000.*<sup>252</sup> In short, the average federal economic crime sentence is relatively low, not because the sentencing structure is unduly lenient, but because U.S. Attorney's Offices prosecute thousands of small cases in which little or no prison time would be called for under any rational sentencing scheme.

If, rather than focusing on the average sentence, one looks instead at the sentences required for even moderately serious white collar offenders, the comparative picture is very different. For example, in January 2003, the sentencing range of Defendant C in Figure 5B above (the postal worker who committed a \$35,000 credit card fraud) would have been 27–33 months; the low end of this range is eight months longer than the average bribery sentence in 2001 and three months longer than the average sentence for burglary.<sup>253</sup> Defendant E (the doctor who overbilled Medicare for \$125,000) would have had a sentencing range of 33–41 months; the low end of this range is nine months longer than the average sentence imposed on burglars in 2001 and almost exactly equivalent to the 34.3 month average sentence for manslaughter.<sup>254</sup> The range for Defendant F (the telemarketer who bilked elderly victims of \$250,000) would have been 97–121 months, or 8–10 years. This is eight months longer than the average sentence imposed for violent crimes in 2001, and twenty-five months longer than the average drug sentence.<sup>255</sup> Defendant H, the crooked small bank president who stole \$1.1 million, in January 2003 faced 188–235 months, or roughly 15–20 years. This sentence is higher than the 2001 average sentence for kidnapping, robbery, sexual abuse, assault, arson, drug trafficking, and racketeering.<sup>256</sup> And a sentence in the midpoint of the 188–235 month range would equal the average sentence for murder.<sup>257</sup>

In short, in the spring of 2003, the substantive case for yet another round of sentence increases for economic offenders was weak. Even from a national political perspective, one might have thought there would be little real pressure for the Commission to take additional action beyond its January 2003 round of targeted guidelines amendments. After all, these amendments addressed all the express directives in Sarbanes-Oxley and imposed very substantial sentence

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<sup>252</sup> *Proceedings of the Third Symposium on Crime and Punishment in the United States: Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses* (October 12-13, 2000), fig. Semisch-2: Number of Offenders in Each Loss Amount Category available at <http://www.ussc.gov/2000sympo/2000sympo.htm>.

<sup>253</sup> U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 30 tbl. 14 (2002).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

increases on serious, high-dollar-loss, corporate criminals of the sort excoriated by President Bush and targeted by the Act. But the game was far from over.

### 3. The Endgame: April 2003

Whatever the substantive merits of the Justice Department's proposed across-the-board sentence increases, the Department still had the statutory interpretation argument that Sarbanes-Oxley *required* sentence increases for everybody, regardless of whether their offenses bore any relation to the high-level corporate fraud at which Sarbanes-Oxley was seemingly directed. This legal argument was backed by the oft-repeated political threat of an appeal to Congress for more specific directives should the Commission spurn the Department's entreaties.

On March 25, 2003, the Sentencing Commission held public hearings on the final round of post-Sarbanes-Oxley guideline amendments. The transcript of the hearing reveals fairly plainly the fault lines in the room.<sup>258</sup> The Justice Department wanted a general economic crime sentencing increase.<sup>259</sup> The other witnesses opposed such an increase.<sup>260</sup> The Commission was resistant to further increases, but concerned that a Justice Department appeal to Congress might produce legislation mandating truly draconian changes.<sup>261</sup> What might have happened if the Commission had felt entirely free to use its own best judgment is unknown. What did happen was that on April 11, 2003, the Friday before the Commission's April meeting, Senator Joseph Biden inserted into the Congressional Record a "legislative history" of Title IX of Sarbanes-Oxley which suggested quite plainly that Senator Biden wanted an across-the-board guideline increase for economic crimes.<sup>262</sup> Senator Biden wrote pointedly that:

*Congress in particular is concerned about base offense levels which may be too low. The increased sentences, while meant to punish the most egregious offenders more severely, are also intended to raise sentences at the lower end of the sentencing guidelines. While Congress acknowledges that the Sentencing Commission's recent amendments are a step in the right direction, the Commission is again directed to consider closely the testimony adduced at the hearings by the Judiciary Subcommittee on Crime and Drugs respecting the ongoing "penalty gap" between white-collar and other offenses. To the*

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<sup>258</sup> See *Hearing Sarbanes-Oxley Amendments*, *supra* note 234.

<sup>259</sup> *Id.* at 291–92, 297, 298–99 (statements of William Mercer and Commissioner Jaso, *ex officio* representative of the Department of Justice).

<sup>260</sup> *Id.* at 292–300 (statements of Barry Boss, James Felman, Lawrence Goldman, and Frank Bowman).

<sup>261</sup> *Id.* at 296–97, 300 (statements of Hon. Ruben Castillo and Hon. William Sessions).

<sup>262</sup> 149 CONG. REC. S5325–31 (daily ed. Apr. 11, 2003) (statement of Senator Biden).

extent that the “penalty gap” existed, in part, by virtue of higher sentences for narcotics offenses, for example, Congress responded by increasing sentences for certain white-collar offenses. Accordingly, we ask the Commission to consider the issues raised herein; determine if adjustments are warranted in light of the enhanced penalty provisions contained in this title; and make recommendations accordingly.<sup>263</sup>

Senator Biden’s “legislative history” is in many respects a curious document. It was written, placed into the Congressional Record, and delivered to the Sentencing Commission nine months after the Sarbanes-Oxley Act was passed, but only days before the Commission was to vote on final post-Sarbanes-Oxley amendments. It is the product of Senator Biden and his staff, not of any committee or even any group of senators. Its obvious purpose was to tell the Sentencing Commission pointedly and publicly what Senator Biden wanted them to do. Faced with the prospect that a Justice Department appeal to Congress would receive support not only from Republicans but also from a prominent Judiciary Committee Democrat, the Commission voted for a broad-based, albeit small and curiously structured, sentence increase.

Effective November 1, 2003, the Commission increased the base offense level from six to seven for economic crime defendants whose offense of conviction carries a statutory maximum sentence of twenty years or more.<sup>264</sup> The well-understood purpose of the amendment was to increase sentences for defendants convicted of violating the statutes whose maximum sentences were raised by Sarbanes-Oxley. This was thought likely to satisfy Senator Biden and sufficient to forestall a Justice Department appeal to Congress. The amendment served these ends. Despite the fact that the Department had originally sought *both* a one-level increase in the base offense level for all economic crime defendants, regardless of offense of conviction, *and* modifications of the loss table raising sentences an additional 25–55% for defendants causing losses of more than \$20,000,<sup>265</sup> it did not go to Congress to protest the Commission’s final post-Sarbanes-Oxley product.

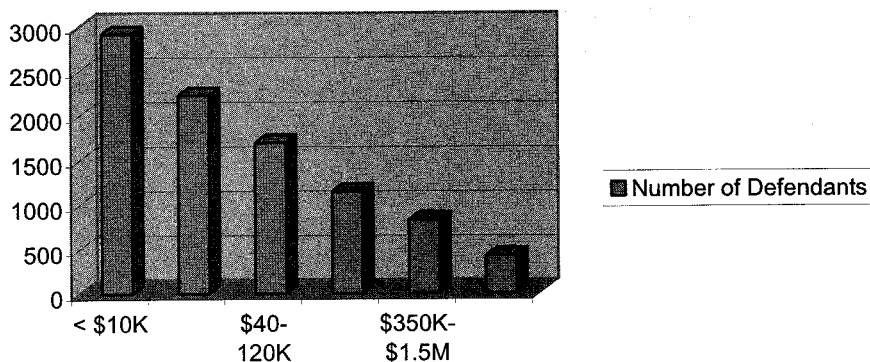
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<sup>263</sup> *Id.* at S5328 (emphasis added).

<sup>264</sup> U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2003).

<sup>265</sup> See DOJ October letter, *supra* note 215. The Justice Department proposed increasing the base offense level of all defendants sentenced under USSG § 2B1.1 from 6 to 7. It also proposed adoption of a new loss table that would have produced a two-offense-level increase over the existing table for all defendants causing losses between \$20,000 and \$120,000, and between \$600,000 and \$1 million, and a four-level increase over the existing table for losses greater than \$1 million. *Id.* Because each two-offense-level increase generates approximately a 25% increase in the minimum guideline sentence, the cumulative effect of a four-level increase is a roughly 55% increase in minimum guideline sentence. U.S. SENTENCING GUIDELINES MANUAL § 5A, sentencing table (2003).

**Figure 6. Number Economic Crime Defendants Sentenced - 1999**



Several points about the April 2003 base level increase amendment are worthy of notice:

First, though a one-base-offense-level increase may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal fraud defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent.<sup>266</sup> Even more importantly, it limits judicial choice of sentence *type* in four out of ten fraud cases prosecuted in federal court. As the Sentencing Commission noted in its statement of reasons for the amendment, the effect of the increase:

[I]s to limit the availability of a probation-only sentence in Zone A of the sentencing table to offenses involving loss amounts of \$10,000 or less, assuming a two level reduction for acceptance of responsibility. Prior to the amendment, a Zone A sentence was available for all offenses . . . involving loss amounts of \$30,000 or less. Similarly, for those offenses for which the higher alternative base offense level will apply, the effect of the amendment is to require an imprisonment sentence in Zone D for offenses involving loss amounts of more than \$70,000. Prior to the amendment, a Zone D sentence was required for all offenses . . . involving loss amounts of more than \$120,000.<sup>267</sup>

<sup>266</sup> See U.S. SENTENCING GUIDELINES MANUAL Ch. 5, Pt. A, sentencing table (2003).

<sup>267</sup> U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 647 (2003) (United States Sentencing Comm.: Final Post-Sarbanes-Oxley Amendments).

Since, as illustrated in Figure 6 above, roughly 40% of all federal economic crime defendants cause losses between \$10,000 and \$120,000, the restriction on judicial sentencing authority will be wide reaching. As suggested at the outset of this Article, a legislative crusade aimed at corrupt captains of industry will have its primary effect on the nobodies of federal economic crime.

Second, new Section 2B1.1(a)(1) is the only section of the guidelines that bases calculation of a defendant's sentence on the statutory maximum sentence of the offense of conviction. Not only is such a provision unique, but it is very much at odds with the structure and philosophy of the Federal Sentencing Guidelines. The Guidelines were written with the understanding that the higgledy-piggledy array of federal criminal statutes and penalties provides no rational guide to the relative seriousness of either offense categories or individual offenses.<sup>268</sup> Thus, the Guidelines' focus is on classifying facts thought relevant to offense seriousness in order to ensure that similarly situated defendants are sentenced similarly, with little emphasis on which crime among the smorgasbord of federal statutes is the formal basis of conviction.<sup>269</sup> This amendment treats statutory maximum sentence as a mechanical, automatically valid, proxy for offense seriousness. Consequently, this amendment represents a small, but potentially precedent-setting, abdication by the Commission in favor of Congress of a central judgment about economic crime sentencing. Moreover, because the amendment categorizes the offenses to which it applies by statutory maximum sentence, rather than by name or type, the cession of judgment to Congress is ongoing. That is, henceforward, any time Congress wants to boost the base offense level of an economic crime statute, it can generate that effect simply by raising the statutory maximum to twenty years. The base offense level would rise automatically, effective on the date of passage of the new statute, with no action by the Sentencing Commission required, not even the formality of drafting and passing a guideline amendment in response to a congressional directive.

Third, setting different base offense levels within the same guideline based on the statutory maximum sentence of the offense of conviction results in a net transfer of sentencing discretion to prosecutors. A great many, perhaps most, economic crimes can be charged either as frauds carrying the newly enhanced twenty-year maximum penalties or under some other statute with a lower statutory maximum. While in theory and according to Department of Justice policy prosecutors are not supposed to charge or fact bargain to manipulate sentencing outcomes, they do.<sup>270</sup> And under the new economic crime guideline, prosecutors

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<sup>268</sup> See Bowman, *supra* note 67, at 475–83.

<sup>269</sup> *Id.* As for economic crimes, consider that approximately 297 federal statutes are sentenced under the current fraud, theft, and destruction of property guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, app. A, statutory index (2003).

<sup>270</sup> The so-called “Ashcroft Memorandum” of September 2003, which placed new constraints on the plea bargaining authority of local U.S. Attorneys (as well as reemphasizing already-existing Department of Justice policies requiring that, in general, federal prosecutors must charge and only accept pleas to the most serious readily provable offense), is a high-profile effort to reduce the

will often be able to offer economic offenders the inducement of a plea to a non-fraud offense carrying the lower base offense level.

Thus, this apparently small amendment represents an important incremental shift in the balance of sentencing authority away from the Sentencing Commission and toward Congress and the Justice Department.

#### V. THE BROADER IMPLICATIONS OF THE CRIMINAL PROVISIONS OF THE SARBANES-OXLEY ACT AND THE EVENTS THAT FOLLOWED

From the perspective either of a federal sentencing specialist or a citizen interested in thoughtful and orderly legislative process, the criminal provisions of the Sarbanes-Oxley Act itself can only be viewed as regrettable. A perception of economic crisis produced political frenzy, which in its turn produced hasty and ill-considered law. On the other hand, to a political realist, the Sarbanes-Oxley statute standing alone may seem no more than an understandable response by the political branches to political imperatives. Indeed, one might take some comfort in the undeniable fact that the language of the bill might have been far worse, far more mandatory and unreflectively punitive. But to one who cares about sound federal sentencing policy, the disheartening part of the story comes after the enactment of the statute. The text of Sarbanes-Oxley's criminal titles was drawn loosely enough to permit the Sentencing Commission to exercise its function of imposing impartial professional judgment on the transient passions of the political moment. Yet, regrettably, the Commission was not permitted to perform its proper role because the dominant political actors in the sentencing universe—Congress and the Justice Department—were unwilling to defer to the Commission's judgment or even to the results of the long collaborative process that produced the 2001 Economic Crime Package. The Justice Department saw in Sarbanes-Oxley a political opening to undo the compromises it felt it had made in negotiations over the 2001 Economic Crime Package. Various legislators insisted that their personal views of sentencing policy should prevail over the Commission's collective judgment.

If all of this were an isolated incident, one would be disinclined to attribute broader significance to the affair. Congress got in a tizzy over the crime *du jour*. The Justice Department seized the political opening to secure somewhat tougher sentences for a class of thieves it felt were underpunished. No big deal. However, Sarbanes-Oxley did not occur in isolation. Similar congressional and executive branch behavior toward the Sentencing Commission has become increasingly common. For a long time after the advent of the Guidelines in 1987, Congress very largely left the Sentencing Commission alone. Congress not only accepted

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incidence of prosecutorial charge and fact bargaining. It is also, perforce, a tacit admission that such bargaining occurs rather commonly. Attorney General John Ashcroft, Memorandum to All Federal Prosecutors: Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), *available at* <http://www.crimelinx.com/ashchargememo.html>.

the guidelines amendments approved by the Commission without demur,<sup>271</sup> but enacted relatively few specific directives to the Commission. If one reads in chronological order through the more than 650 guidelines amendments passed by the Commission, up through the mid-1990s one finds a fairly low incidence of amendments passed in response to congressional directives. The closer to the present one reads, the more common congressional directives become. By the spring of 2003, congressional directives consumed the overwhelming majority of the Commission's agenda.<sup>272</sup> The Commission's 2003–2004 agenda is also heavily weighted toward responding to Congress.<sup>273</sup>

Not only has the frequency of congressional directives increased, but their content has pushed progressively deeper into the core functions of the Sentencing Commission. The most recent and notorious example was the Feeney Amendment to the PROTECT Act, a bill that sought to reduce judicial authority to depart from guidelines sentences.<sup>274</sup> A full discussion of the Feeney Amendment is beyond the scope of this Article,<sup>275</sup> but in brief it directly and consciously overrode the decision of the U.S. Supreme Court in *Koon v. United States*<sup>276</sup> that liberalized the standard of appellate review of trial court departures from the guidelines, and it commanded the Sentencing Commission to pass guideline amendments to “substantially reduce” downward departures. Where the Sarbanes-Oxley Act and all previous legislation couched expressions of congressional will as requests or directives to the Sentencing Commission to study issues or draft guidelines to achieve a stated objective, the Feeney Amendment directly amended the Guidelines text for the first time since the Guidelines became law in 1987.<sup>277</sup> In

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<sup>271</sup> Since 1987, Congress has legislatively overruled the Sentencing Commission on only two of the more than 650 amendments to the original guidelines approved by the Commission. See Sentencing Guidelines Disapproval, Pub. L. No. 104-38, 109 Stat. 334 (1995) (rejecting Commission amendments to the crack cocaine and money laundering guidelines).

<sup>272</sup> On May 1, 2003, the Sentencing Commission submitted to Congress amendments in nine major subject areas. Five of the nine were directly responsive to statutory mandates. They included the post-Sarbanes-Oxley amendments, as well as amendments on cyber-security, terrorism, campaign finance, and offenses involving body armor. A sixth arose from concerns expressed by “the Department of Justice, some members of Congress, and an ad hoc advisory group formed by the Commission.” U.S. Sentencing Commission, Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, amend. 1 (Reason for amendment) (May 1, 2003), available at <http://www.ussc.gov/2003guid.2003cong.pdf>.

<sup>273</sup> U.S. Sentencing Commission, Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, Fed. Reg. Notice BAC2210-40/2211-01 (Dec. 30, 2003).

<sup>274</sup> Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003).

<sup>275</sup> For discussions of the PROTECT Act and the Feeney Amendment, see generally *The Feeney Amendment: Roots and Reactions*, 15 FED. SENTENCING REP. 307 (2003) (containing text, legislative history, and commentary on this legislation).

<sup>276</sup> 518 U.S. 81 (1996).

<sup>277</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (Trafficking in Material Relating to Exploitation of a Minor), amended by Pub. L. No. 108-21, § 401(i)(1)(C) (2003); U.S. SENTENCING GUIDELINES MANUAL § 2G2.4(b) (Possession of Materials Depicting a Minor Engaged in Sexually



addition, Feeney limited the number of judges who can serve on the Sentencing Commission to a maximum of three, the first modification of the structure and membership requirements of the Commission in its history.<sup>278</sup>

Considered together, Sarbanes-Oxley, the general trend toward increased congressional and executive involvement with the details of sentencing lawmaking, and the Feeney Amendment represent an important set of developments in the history of the United States Sentencing Commission and the ongoing struggle for institutional control over federal sentencing law. I think it not too much to say that these developments raise serious questions about the continuing viability of the U.S. Sentencing Commission as an independent policy-making body and, ultimately, about the viability of the entire federal guidelines sentencing experiment. A complete development of this suggestion is beyond the scope of this paper, but several points seem clear.

First, the primary justification for having a Sentencing Commission is its status as an independent source of expertise and non-partisan judgment. If the coordinated actions of the executive and legislative branches of government routinely, rather than occasionally, prevent the Commission from freely exercising and implementing its judgment in the form of actual guidelines, there is reason to question what useful purpose a Commission serves. I do not mean to overstate the case here. The Commission remains, at least for the present, the primary source of independent rulemaking authority for many federal sentencing questions. Nonetheless, at least some members of Congress are increasingly disposed to reach in and directly alter sentencing guidelines to impose their own opinions on the details of sentencing law. At the same time, the centers of power within Congress—particularly the judiciary committees of both houses—which have historically tended to protect the Commission's independence from undue congressional meddling, seem less and less disposed to play that role.

As a result, to an ever-increasing degree, Congress (often at the behest of the Justice Department) is intervening either to block initiatives the Commission would like to undertake<sup>279</sup> or to order the Commission to do things it certainly

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Explicit Conduct), *amended by* Pub. L. No. 18-21 § 401(i)(1)(B) (2003); U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (Acceptance of Responsibility), *amended by* Pub. L. No. 108-21, §401(g) (2003); U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), *amended by* Pub. L. No. 108-21, §§ 401(i)(1)(A) (2003); U.S. SENTENCING GUIDELINES MANUAL ch. 5, various sections (relating to grounds for departure), *amended by* Pub. L. No. 108-21, §§ 401(b)(1)–(5) (2003).

<sup>278</sup> 28 U.S.C. § 991(a), *amended by* PROTECT Act, § 401(n)(1), 117 Stat. 650 (2003).

<sup>279</sup> An example of this phenomenon is the repeated efforts by the Commission to amend the controversial guideline governing crack cocaine. In 1995, the Commission passed a guideline amendment that would have changed the weight ratio between powder and crack cocaine used in sentencing defendants under § 2D1.1 from 100-1 to 1-1. Congress immediately passed a law rejecting this amendment. Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). In the spring of 2002, the Commission was prepared to try again, but the initiative died in the face of opposition from the Department of Justice, *see U.S. Sentencing Commission Hearing, 3/19/02: Cocaine Sentencing*, 14 FED. SENTENCING REP. 217 (2001-2002) (testimony of Deputy Attorney General Larry Thompson),

would not do if left to its own counsels. Both rounds of post-Sarbanes-Oxley guidelines amendments plainly fall into the latter category.

For its part, the Justice Department seems ever more intent on gathering sentencing discretion to itself. This is occurring at two levels. At the district court level, the Department is actively seeking to maximize the authority of prosecutors over sentencing in individual cases, generally at the expense of judicial discretion. At the national policymaking level, the Department is no longer content with merely lobbying the Sentencing Commission, with being one among a number of institutional voices making its case to a Commission whose decisions are entitled to deference. Instead, to an unprecedented degree, the Department seems to view the Commission primarily as an obstacle to be negotiated on the road to its own policy objectives.

Second, a coordinated effort by Congress and the Department of Justice to devalue the Sentencing Commission must be understood as an offensive against the judicial branch. Judges have often complained about the Sentencing Commission and its Guidelines. Nonetheless, the Commission was made an independent agency of the judicial branch and has drawn so many of its members from the federal bench because sentencing was acknowledged to be a characteristically judicial function. While the Sentencing Guidelines markedly decreased the sentencing authority of individual judges in particular cases, the Sentencing Commission retained for the judicial branch a powerful voice in setting national sentencing rules. Sarbanes-Oxley considered together with the Feeney Amendment suggest that Congress and the Executive Branch now begrudge judges even this authority over sentencing policy.

Third, both logic and recent experience suggest that routine subjugation of the Commission to a Congress-DOJ alliance is likely to produce poor policy outcomes. One might argue that Congress *should* be primarily responsible, in fact as well as theory, for making the law of criminal punishment. After all, a central constitutional criticism of the Commission was that it represented an improper delegation of congressional authority.<sup>280</sup> Indeed, so long as sentencing was conducted in something akin to the old pre-guidelines way, with Congress setting broad sentencing ranges and leaving the imposition of sentence in individual cases to judges and parole officials, there could be neither a theoretical nor practical objection to Congress exercising its undoubted constitutional authority over sentencing matters. When a legislature defines conduct as a crime and sets general parameters for punishment of that crime, it does what it does best—it selects the categories of conduct that deserve the label of crime and, in setting penalty ranges, expresses the collective judgment of the community about the relative seriousness

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and congressional Republicans, see *Letter from Rep. Lamar Smith, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, to Diana E. Murphy, Chair, U.S. Sentencing Commission*, 14 FED. SENTENCING REP. 226 (2001-2002). See generally Frank O. Bowman, III, *The Geology of Drug Policy in 2002*, 14 FED. SENTENCING REP. 123 (2002).

<sup>280</sup> *Mistretta v. United States*, 488 U.S. 361, 371 (1988).

of different categories of crimes. On the other hand, when a legislature opts for a guidelines sentencing system, the choice to adopt such a system may be a wise one, but legislative attempts to micromanage it will be apt to go astray.

At the very least Congress is ill suited to making detailed sentencing rules. Legislatures certainly can create and maintain a functional, purely statutory sentencing guidelines system. Such systems, for example the one in the State of Washington, exist and are said to work reasonably well.<sup>281</sup> However, state statutory guidelines tend to be simpler and more closely tied to the offense of conviction than the federal model. In the Sentencing Reform Act of 1984, Congress designedly set the original Sentencing Commission on a path that led inexorably to guidelines which narrowly constrain judicial discretion in a web of complex fact-dependent rules.<sup>282</sup> Congress lacks the time, expertise, and attention span to make guideline-specific decisions at this level of detail. When Congress starts fiddling with specific guidelines, it will often commit blunders arising from ignorance of the structure and history of guidelines language. As noted above, Sarbanes-Oxley provides a number of examples of this phenomenon.<sup>283</sup>

But the Sarbanes-Oxley saga suggests a problem even more profound than legislative incapacity to fine-tune a complex system of rules. The Justice Department has a sophisticated understanding of the guidelines, but its sophistication arises from the fact that it is a litigant in all federal sentencings. If Congress continually seeks to diminish judicial sentencing discretion, routinely disregards the Sentencing Commission, and instead takes all its cues from DOJ, the effect is to harness Congress's plenary power over sentencing law to the interests of only one of the interested parties in criminal cases. The Justice Department is a great institution (in which I served with pride for nearly a decade), but the unchecked implementation of whatever DOJ wants cannot *always* be the best policy for the country.

Fourth, the emerging Congress-DOJ alliance in sentencing matters is surely related to the undeniable fact that the increasing incidence of direct congressional intervention into guidelines lawmaking has been, almost without exception, a history of intervention in favor of ever-higher sentences for defendants. I am not one to say that higher sentences are always a bad thing. Indeed, I helped craft the 2001 Economic Crime Package in part to secure increased sentences for some classes of economic crime defendants who, in the view of many, were often underpunished under prior law. Nonetheless, it seems clear that a rational and healthy criminal sentencing system must be receptive to both upward and downward adjustments of criminal penalties. Reducing sentences may sometimes

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<sup>281</sup> See WASH. REV. CODE § 9.94A (2004). The Washington guidelines were written by a statutorily authorized Sentencing Commission, but are a part of the state code. Moreover, the offense seriousness axis of the sentencing grid is based on the offense of conviction, with upward and downward adjustments for a limited number of factors.

<sup>282</sup> See Stith & Koh, *supra* note 25.

<sup>283</sup> See *supra* notes 205–10 and accompanying text.

be a bad idea, but raising sentences cannot always be a good idea. The alliance of the Department of Justice and Congress has produced a sentencing system that acts in practice as a one-way upward ratchet, and that cannot be healthy.

It can certainly be argued that these developments are the predictable consequence of the design of the Sentencing Commission, its peculiar and vulnerable placement among the institutions of the federal government, and the lack of any meaningful fiscal restraint on the punitive instincts of national political figures. Nonetheless, whether predictable or not, the current state of affairs is, at best, disheartening for those like myself who have been supporters of the guidelines experiment. For me, the 2001 Economic Crime Package was a harbinger of hope that the Guidelines process could work as it was intended, that it could produce sensible outcomes that would satisfy and be defended by all the institutional actors in the federal sentencing universe. The Sarbanes-Oxley Act and the guideline amendments it produced—particularly when taken in conjunction with the Feeney Amendment—suggest that even the Commission's best work is fatally vulnerable to political expediency.

I do not know if this will prove to be so. And, at least at the moment, I have no prescription for preventing this unhappy outcome beyond a perhaps unrealistic hope that Congress and the Justice Department will rediscover a sense of self-restraint, recognizing that the system cannot survive without such restraint. Nonetheless, an understanding of how Sarbanes-Oxley and the ensuing sentencing changes came to be provides insights into how federal sentencing policy is now made. One can at least hope that these insights will stimulate serious thinking about how to fix a system that, so far, has failed of its promise and may now be so compromised that it will never be able to function as intended.

### Explanations for assumption for Figure 5B on page 428

- <sup>1</sup> Offense Level 6. Assumes no "More than minimal planning" enhancement (MMP)
- <sup>2</sup> Offense Level 6. Assumes no MMP.
- <sup>3</sup> Offense Level 8. Assumes no MMP.
- <sup>4</sup> Offense Level 9. Assumes no MMP
- <sup>5</sup> Offense Level 10. Assumes no MMP.
- <sup>6</sup> Offense Level 13. Assumes fraud conviction, MMP, two-level abuse of trust.
- <sup>7</sup> Offense Level 14. Assumes fraud conviction, MMP, two-level abuse of trust.
- <sup>8</sup> Offense Level 18. Assumes fraud conviction, four-level undelivered U.S. Mail (§2B1.1 app. note 3(B)).
- <sup>9</sup> Offense Level 12. Assumes MMP.
- <sup>10</sup> Offense Level 13. Assumes MMP.
- <sup>11</sup> Offense Level 18. Assumes four-level > fifty victims, and two-level sophisticated means.
- <sup>12</sup> Offense Level 16. Assumes MMP, two-level abuse of trust.
- <sup>13</sup> Offense Level 17. Assumes MMP, two-level abuse of trust.
- <sup>14</sup> Offense Level 20. Assumes two-level sophisticated means, two-level abuse of trust.
- <sup>15</sup> Offense Level 21. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
- <sup>16</sup> Offense Level 22. Assumes MMP, four-level aggravating role, two-level vulnerable victim.
- <sup>17</sup> Offense Level 24. Assumes MMP, four-level aggravating role, two-level vulnerable victim, two-level mass marketing.
- <sup>18</sup> Offense Level 28. Assumes four-level > fifty victims, four-level aggravating role, two-level vulnerable victim.
- <sup>19</sup> Offense Level 30. Assumes six-level > 250 victims, four-level aggravating role, two-level vulnerable victim.
- <sup>20</sup> Offense Level 17. Assumes MMP, two-level use of special skill.
- <sup>21</sup> Offense Level 19. Assumes MMP, two-level use of special skill.
- <sup>22</sup> Offense Level 26. Assumes two-level sophisticated means, two-level access device/means of identification, two-level > ten victims, two-level use of special skill.
- <sup>23</sup> Offense Level 18. Assumes MMP, two-level abuse of trust.
- <sup>24</sup> Offense Level 21. Assumes MMP, two-level abuse of trust.
- <sup>25</sup> Offense Level 21. Assumes MMP, two-level abuse of trust, four-level endanger financial institution.
- <sup>26</sup> Offense Level 32. Assumes two-level >ten victims, two-level sophisticated means, four-level jeopardize financial institution, two-level abuse of trust.
- <sup>27</sup> Offense Level 36. Assumes two-level >ten victims, two-level sophisticated means, four-level jeopardize financial institution, four-level officer of publicly traded corporation, two-level abuse of trust.
- <sup>28</sup> Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.
- <sup>29</sup> Offense Level 29. Assumes MMP, four-level aggravating role, two-level abuse of trust.
- <sup>30</sup> Offense Level 34. Assumes two-level sophisticated means, four-level aggravating role, two-level abuse of trust.

<sup>31</sup> Offense Level 38. Assumes two-level sophisticated means, four-level violation of securities law by officer of publicly traded corporation, four-level aggravating role, two-level abuse of trust.

<sup>32</sup> Offense Level 25. Assumes MMP, four-level aggravating role, two-level abuse of trust.

<sup>33</sup> Offense Level 32. Assumes MMP, four-level aggravating role, two level abuse of trust.

<sup>34</sup> Offense Level 34. Assumes MMP, two-level sophisticated means, four-level aggravating role, two level abuse of trust.

<sup>35</sup> Offense Level 48. Assumes four-level > fifty victims, two-level sophisticated means, four-level jeopardize soundness of financial institution (pension fund), four-level aggravating role, two-level abuse of trust.

<sup>36</sup> Offense Level 54. Assumes six-level > 250 victims, two-level sophisticated means, four-level jeopardize soundness of financial institution (pension fund), four-level violation of securities law by officer of publicly traded corporation, four-level aggravating role, two-level abuse of trust.